DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-168
Title: Steven Lefemine, dba Columbia Christians for Life, Petitioner
v.
Dan Wideman, et al.
Docketed: August 6, 2012
Linked with 12A17
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (10-1905)
Decision Date: March 5, 2012
Rehearing Denied: April 2, 2012

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jun 27 2012	Application (12A17) to extend the time to file a petition for a writ of certiorari from July 1, 2012 to July 31, 2012, submitted to The Chief Justice.
Jul 9 2012	Application (12A17) granted by The Chief Justice extending the time to file until July 31, 2012.
Jul 31 2012	Petition for a writ of certiorari filed. (Response due September 5, 2012)
Sep 5 2012	Brief of respondents Dan Wideman, et al. in opposition filed.
Sep 18 2012	Reply of petitioner Steve Lefemine filed. (Distributed)
Sep 19 2012	DISTRIBUTED for Conference of October 5, 2012.
Oct 9 2012	DISTRIBUTED for Conference of October 12, 2012.
Oct 15 2012	DISTRIBUTED for Conference of October 26, 2012.
Oct 29 2012	DISTRIBUTED for Conference of November 2, 2012.
Nov 5 2012	Petition GRANTED. Judgment VACATED and case REMANDED. Opinion per curiam. (Detached Opinion)
Dec 7 2012	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

No. 12-168

SUPREME COURT, U.S.
FILED
JUL 31 2012
OFFICE OF THE CLERK

In the Supreme Court of the United States

STEVEN LEFEMINE, d/b/a Columbia Christians for Life,

Petitioner,

v.

DAN WIDEMAN, individually and in his official capacity; MIKE FREDERICK, individually and in his official capacity; LONNIE SMITH, individually and in his official capacity; BRANDON STRICKLAND, individually and in his official capacity; TONY DAVIS, Sheriff, in his official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1976, Congress enacted the Civil Rights Attorney's Fee Act of 1976 (now codified as part 42 U.S.C. § 1988) with the express intent of allowing awards of attorney's fees to prevailing plaintiffs in actions brought under, *inter alia*, 42 U.S.C. § 1983. This Court then labored for over twenty years—from *Maher v. Gagne*, 448 U.S. 122 (1980) to *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001)—to craft its "prevailing plaintiff" jurisprudence. Under that jurisprudence, prevailing plaintiffs are those who obtain "enforceable judgments on the merits [or] court-ordered consent decrees [which] create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604 (quotation marks and citation omitted).

The Fourth Circuit, in the instant § 1983 case, rejected this Court's test, the view of every other court of appeals, and its own prior practice, when it refused to recognize the Petitioner, Mr. Lefemine—who obtained permanent injunctive relief and declaratory relief on the merits of his case—as a prevailing plaintiff, opting instead to employ a test that examines the *nature* of the alteration in the legal relationship. In so doing, the Fourth Circuit also abandoned its own prior view and the view of every other court of appeals that the question of whether a plaintiff has prevailed is a question of law, subject to *de novo* review. The Questions Presented are these:

1. Did the Fourth Circuit err when it rejected this

Court's *Buckhannon* rule by holding that a plaintiff who has obtained a permanent injunction and declaratory relief on the merits of his claim has nonetheless not prevailed?

2. Did the Fourth Circuit err when it promulgated its new rule that the determination of whether a plaintiff has prevailed will now be subject to abuse of discretion review?

PARTIES TO THE PROCEEDING

All Parties to this proceeding are listed in full on the cover of this Petition.

STATEMENT IN LIEU OF CORPORATE DISCLOSURE STATEMENT

Petitioner Steven Lefemine sometimes conducts business as Columbia Christians for Life. However, Columbia Christians for Life has no independent existence and is not a corporation. Thus, no Corporate Disclosure Statement is required.

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

STATEMENT IN LIEU OF CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

DECISIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 6

I. COURT SHOULD GRANT THE WRIT BECAUSE THE FOURTH CIRCUIT'S JUDGMENT WILL STRIP UNTOLD NUMBERS OF CIVIL RIGHTS PLAINTIFFS OF ATTORNEY'S FEES AWARDS THAT CONGRESS INTENDED THEM TO HAVE. 7

II. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FOURTH CIRCUIT'S JUDGMENT MISUNDERSTANDS AND IGNORES THIS COURT'S "PREVAILING

PLAINTIFF" JURISPRUDENCE. 11

III. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FOURTH CIRCUIT'S HOLDING CREATES A CIRCUIT SPLIT ON THE PREVAILING PLAINTIFF TEST AND ON THE STANDARD OF REVIEW TO BE APPLIED TO THAT QUESTION. 17

A. The Fourth Circuit's Holding Creates a Circuit Split on the Prevailing Plaintiff Test. 17

B. The Fourth Circuit's Holding Also Creates a Circuit Split on the Applicable Standard of Review. 20

CONCLUSION 23

APPENDIX ..... App. 1

United States Court of Appeals for the Fourth Circuit's Order denying Rehearing ..... App. 2

Fourth Circuit's Opinion App. 4

United States District Court of the District of South Carolina's Opinion App. 26

TABLE OF AUTHORITIES

Cases **Page(s)**

A.R. ex rel. R.V. v. New York City Dept. of Educ., 407 F.3d 65, 74-76 (2d 2005) 19

Allen v. Burke, 690 F.2d 376 (4th Cir. 1982) 10,16

Alyeska Pipeline Service Corp. v. Wilderness Society, 421 U.S. 240 (1975) 6, 8

Bailey v. Mississippi, 407 F.3d 684 (5th Cir. 2005) 21-22

Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305 (4th Cir. 2001) 18

Bingham v. New Berlin School Dist., 550 F.3d 601 (7th Cir. 2008) 19

Biodiversity Conservation Alliance v. Stem, 519 F.3d 1226(10th Cir. 2008) 19

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001) ...i-ii, 15 *et passim*

Christina A. ex rel. Jennifer A. v. Bloomberg, 315 F.3d 990 (8th Cir.2003) 22

Cook v. Randolph County, Ga., 573 F.3d 1143 (11th Cir. 2009)..... 19

Davis v. Department of Justice, 460 F.3d 92 (D.C. Cir. 2006) 19

Dearmore v. City of Garland, 519 F.3d 517, 521 (5th Cir. 2008) 19

Farrar v. Hobby, 506 U.S. 103, 111-12 (1992) 14

Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co., Ltd., 254 F.3d 987 (11th Cir.2001) 23

Grissom v. The Mills Corp., 549 F.3d 313 (4th Cir. 2008) 17

Goldstein v. Moatz, 445 F.3d 747 (4th Cir. 2006) ... 18

Hewitt v. Helms, 482 U.S. 755, 763 (1987) 11, 13

Hutchinson ex rel. Julien v. Patrick, 636 F.3d 1 (1st Cir. 2011) 22

Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, (1989) 5

J.D. ex rel. Davis v. Kanawha County Bd. of Educ., 571 F.3d 381 (4th Cir. 2009) 17

Kansas Judicial Watch v. Stout, 653 F.3d 1230 (10th Cir. 2011) 22-23

Lefemine v. Davis, 732 F.Supp.2d 614 (D.S.C. 2010) 1

Lefemine v. Wideman, 672 F.3d 292 (4th Cir. 2012) 1

Maher v. Gagne, 448 U.S. 122 (1980) i

Palmetto Props., Inc. v. County of DuPage, 375 F.3d 542 (7th Cir.2004) 22

People Helpers Foundation, Inc. v. City of Richmond, 12 F.3d 1321 (4th Cir. 1993) ..... 11 *et passim*

Preserv. Coal. v. Fed. Transit Admin., 356 F.3d 444 (2d Cir.2004) 22

Pulliam v. Allen, 466 U.S. 522 ..... 8, 10, 16

Radvansky v. City of Olmsted Falls, 496 F.3d 609 (6th Cir. 2007) 22

Rhodes v. Stewart, 488 U.S. 1 (1988) 14

Richard S. v. Dep't of Developmental Servs., 317 F.3d 1080 (9th Cir.2003) 22

Rogers Group, Inc. v. City of Fayetteville, Ark., 683 F.3d 903, 909 (8th Cir. 2012) 19

Shum v. Intel Corp., 629 F.3d 1360 (Fed. Cir. 2010) 23

Sierra Club v. Hamilton County Bd. of County Com'rs, 504 F.3d 634 (6th Cir. 2007) 19

Singer Management Consultants, Inc. v. Milgram, 650 F.3d 223 (3d Cir. 2011) 19

Smith v. Fitchburg Public Schools, 401 F.3d 16, (1st Cir. 2005) 19

Smyth ex rel. Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002) 18

Teachers Association v. Garland Independent School District, 489 U.S. 782, 789 (1989) 5-6, 11-13

Truesdell v. Philadelphia Hous. Auth., 290 F.3d 159 (3d Cir.2002) 22

Turner v. National Transp. Safety Bd., 608 F.3d 12 (D.C. Cir. 2010) 23

United States v. Milner, 583 F.3d 1174, 1196 (9th Cir. 2009) 19

Ward v. U.S. Postal Service, 672 F.3d 1294 (Fed. Cir. 2012) 19

Statutes

42 U.S.C. § 1983 ..... i, 1, 2, 7

42 U.S.C. § 1988 ..... *passim*

Other Materials

121 Cong. Rec. (1975) 8

80 L. Ed. 2d 910-911 8-9

DECISIONS BELOW

The opinion of the United States District Court for the District of South Carolina is reported at 732 F.Supp.2d 614 (under the name *Lefemine v. Davis*) and reprinted at App. 26. The opinion of the United States court of Appeals for the Fourth Circuit is published at 672 F.3d 292 and reprinted at App. 4. The Fourth Circuit's Order denying Mr. Lefemine's motion for rehearing (panel or en banc) is reprinted at App. 2.

STATEMENT OF JURISDICTION

The Fourth Circuit filed its opinion on March 5, 2012. It denied Mr. Lefemine's Petition for Rehearing on April 2, 2012. On July 9, 2012, Chief Justice Roberts extended the time for filing the instant Petition for a Writ of Certiorari through and including July 31, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Civil Rights Attorney's Fees Award Act of 1976, which has been codified as part of 42 U.S.C. § 1988, states in pertinent part as follows:

> (b) Attorney's fees
>
> In any action or proceeding to enforce a provision of section[ ] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

STATEMENT OF THE CASE

On September 24, 2008, Mr. Lefemine filed suit under 42 U.S.C. § 1983 in the United States District Court for the District of South Carolina to vindicate his First Amendment rights.[1] Mr. Lefemine alleged and the District Court held that employee's of the Greenwood County, South Carolina, Sheriff's Office violated Mr. Lefemine's free exercise of religion, free speech, and free assembly rights, when they twice threatened him with arrest. App. 43-44. The District Court awarded Mr. Lefemine an enforceable judgment on the merits, yet refused to award him attorney's fees under 42 U.S.C. § 1988. App. 50. Mr. Lefemine appealed to the Fourth Circuit, which also refused to award attorney's fees. App. 23. The Questions Present by this Petition deal with that decision and the standard of review that the Fourth Circuit used in reaching that decision. However, the following broader factual and procedural information sets the context for the legal questions now before this Court.

Steven Lefemine, doing business as Columbia Christian for Life—with the aid of like-minded citizens—frequently engages in pro-life protests. During these protests, Mr. Lefemine and others carry pictures of aborted babies "to raise public

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[1] 28 U.S.C. §§ 1343(a)(3) and (4), provide original jurisdiction in the district courts for all suits brought pursuant to 42 U.S.C. § 1983. Jurisdiction was also conferred by 28 U.S.C. § 1331 because the cause of action arose under the Constitution and laws of the United States.

awareness of the horrors of abortion throughout the State of South Carolina." App. 27. On November 3, 2005, Mr. Lefemine was conducting such a protest in Greenwood County, South Carolina. App. 7. Several employees of the Sheriff's Office, Respondents here, were dispatched to the scene of the protest where they threatened Mr. Lefemine with being ticketed for breach of peace. App. 26-31. Mr. Lefemine instructed those assisting him to remove the signs. App. 28-30.

When Mr. Lefemine desired to return to the same general location again in 2006, he retained legal counsel who wrote letters to the sheriffs of both Greenwood County and Greenwood City, expressing concerns about the prior year's events, putting them on notice that Mr. Lefemine intended to return, and explaining that if Mr. Lefimine's rights were violated he would file suit on Mr. Lefemine's behalf. App. 30-31. The city sheriff replied via letter and informed Mr. Lefemine's counsel that Mr. Lefemen and his group would be welcome to protest. The county chief deputy (Respondent Frederick), however, answered via letter that if Mr. Lefemine returned and used the signs he would be ordered to "stop or face criminal sanctions." *Id.* This response prompted Mr. Lefemine's lawsuit.

Mr. Lefemine's complaint contained three causes of action and, as noted, he prevailed on all of them. The District Court held that the actions of the Sherrif's Office employees violated Mr. Lefemine's rights. Specifically, the Court held that the employees imposed a content-based restriction on Mr. Lefemine's speech which occurred in a public forum. It further held that that restriction violated not only Mr. Lefemine's free speech rights, but also

his free assembly and free exercise rights. App. 34-44. However, the Court also held that those rights were not clearly established at the time (due to the graphic nature of the signs), and thus held the employees were entitled to qualified immunity. App. 49. However, the Court did award Mr. Lefemine a permanent injunction, which prohibited the employees from engaging in the same behavior they had previously engaged in, namely imposing "content-based restrictions on Plaintiff's display of graphic signs without narrowly tailoring its restriction to serve a compelling state interest." App. 50. The Court failed to rule on Mr. Lefemine's request for declaratory relief App. 19 (but see immediately below pp. 9-10). Finally, while treating Mr. Lefemine as a prevailing party, the Court failed to award him attorney's fees under 42 U.S.C. § 1988.[2]

Cross appeals followed. Mr. Lefemine appealed the District Court's ruling that the employees were entitled to qualified immunity, and one of the employees who no longer works for the Sheriff's Office appealed the Court's ruling that the injunction covered him. The Fourth Circuit affirmed the District Court on both points. App. 19, 25. These aspects of the Fourth Circuit's judgment, however, are not implicated by the Questions Presented in this Petition. Importantly, however, none of the employees appealed the District Court's holdings regarding any of the constitutional violations. App.

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[2] The Court's attorneys' fee analysis reads in its entirety as follows: "Pursuant to 42 U.S.C. § 1988(b), a prevailing party in a § 1983 action may, in the court's discretion, receive attorney's fees. Under the totality of the facts in this case the award of attorney's fees is not warranted."

15, n.5.

Mr. Lefemine also appealed the District Court's failure to award attorneys' fees and its failure to rule on his request for declaratory relief. App. 10-11. The Fourth Circuit held that the District Court's opinion must be read as having implicitly granted Mr. Lefemine the declaratory relief he requested. App. 20. Thus, when the Fourth Circuit turned to the question of attorneys' fees, it had already determined that Mr. Lefemine had been awarded a permanent injunction and declaratory relief on the merits of his claims.[3]

In appealing the District Court's refusal to award attorneys' fees, Mr. Lefemine argued that under this Court's decision in *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989), the District Court was *required* to award him fees, absent unusual circumstances; and that the District Court did not find special circumstances; and that it could not, as none existed. Thus, Mr. Lefemine argued, the District Court abused its discretion. App. 21. However, instead of addressing this argument, the Fourth Circuit opined that Mr. Lefemine was not entitled to a fee award *because he was not a prevailing plaintiff*. App. 22-23.

As noted, the Fourth Circuit had already acknowledged that Mr. Lefemine had obtained a permanent injunction and declaratory relief as to all claims. Furthermore, the Fourth Circuit acknowledged this Court's rule from *Texas State*

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[3] The Fourth Circuit refers to Mr. Lefemine's "rights"—plural—which most naturally refers to all three of his claims.

Teachers Association v. Garland Independent School District, 489 U.S. 782, 789 (1989) that "[a]t a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." Nonetheless, the Fourth Circuit held that Mr. Lefemine was not a prevailing party because the injunction he won merely "ordered Defendants to comply with the law and safeguard Plaintiff's constitutional rights in the future." *Id.* Further, in recasting the question in terms of whether Mr. Lefemine was a prevailing party, the Fourth Circuit continued to apply an abuse of discretion standard. App. 21.

Believing that both the standard of review and the test applied to determine whether he was a prevailing party were incorrect, Mr. Lefemine filed a motion for rehearing (panel or en banc). The Fourth Circuit denied that motion. App. 2-3.

REASON FOR GRANTING THE WRIT

There are three reasons for granting the Writ. First, the Fourth Circuit's judgment thwarts Congress's intent in a way that will impact untold numbers of civil rights litigants. Second, the Fourth Circuit's judgment variously misunderstands and refuses to be bound by this Court's long-standing jurisprudence. Third, the judgment creates a circuit split on two issues: 1) the test to be applied to determine whether a plaintiff has prevailed and 2) the standard of review to be applied to this question. This Petition will examine each in turn.

I. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FOURTH CIRCUIT'S JUDGMENT WILL STRIP UNTOLD NUMBERS OF CIVIL RIGHTS PLAINTIFFS OF ATTORNEY'S FEES AWARDS THAT CONGRESS INTENDED THEM TO HAVE.

As noted in the Question Presented, Congress passed the Civil Rights Attorney's Fees Act of 1976 (now codified as part 42 U.S.C. § 1988) with the express intent of allowing awards of attorneys' fees to prevailing plaintiffs in actions brought under, *inter alia*, 42 U.S.C. § 1983. Congress passed the Act in direct response to this Court's decision in *Alyeska Pipeline Service Corp. v. Wilderness Society*, 421 U.S. 240 (1975). Senator John V. Tunney, as Chairman of the Senate Judiciary Subcommittee on Constitutional Rights, noted when he introduced the original version of the bill that became the Act that

> [t]he purpose and effect of this bill is simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. The Supreme Court's recent *Alyeska* decision has required specific statutory authorization if Federal courts continue previous policies of awarding fees under all

> Federal civil rights statutes. This bill simply applies the type of "fee-shifting" provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards.

121 Cong. Rec. 26,806 (1975).

Senator Tunney went on to emphasize that in *Alyeska* this Court had before it "an environmental case not a civil rights case." 121 Cong. Rec. 26,806 (1975). Indeed, *Alyeska* withdrew the availability of attorney's fees in all cases—not just civil rights—for which Congress had not specifically authorized such fees. 421 U.S. at 269. However, as Senator Tunney's remarks quoted above indicate, his purpose in introducing his bill was to restore attorney's fees in *only* civil rights cases, not in all cases. Mr. Lefemine's case is a quintessential civil rights case—his free speech, free exercise, and free assembly rights were all violated. It is exactly these cases in which attorney's fees awards as so crucial.

Significantly, Senator Tunney noted that civil rights litigants often have no funds with which to hire an attorney and that often no damages are awarded from which the attorneys could draw a fee. 121 Cong. Rec. 26,806 (1975).

Furthermore, this Court put a finer point on matters in *Pulliam v. Allen*, 466 U.S. 522, 527 (1984). This Court—over the arguments of the Attorneys General of 49 states and the Conference of Chief

Justices, among others[4]—explicitly held that even where damages are unavailable due to immunity defenses, attorneys' fees should still be awarded to prevailing plaintiffs: "The legislative history of § 1988 clearly indicates that Congress intended to provide for attorney's fees in cases where relief properly is granted against officials who are immune from damages awards." In support of this assertion, this Court quoted the House Report:

> "[W]hile damages are theoretically available under the statutes covered by H.R.15460 [which became the Attorney's Fees Awards Act], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H.R.15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees."

Id. at 527, n.4 (quoting H.R. Rep. No. 94–1558, p.

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[4] See 80 L. Ed.2d 911-12 for the list of briefs. The Attorney General of Virginia argued the cause. The other 48 Attorneys General filed an Amicus Brief, as did the Conference of Chief Justices. *Pulliam* involved the issue of judicial immunity, not qualified immunity. However, the points made in this Court's opinion apply equally to qualified immunity.

9 (1976).

The Fourth Circuit's answer to all of this was that the district court "ordered Defendants to comply with the law and safeguard Plaintiff's constitutional rights in the future. No other damages were awarded" App. 22. The Fourth Circuit therefore believed that the injunction and declaratory judgment had "not altered the relative positions of the parties." App. 23 (internal quotation and citation omitted).

Ironically, the court whose judgment was affirmed in *Pulliam* was the Fourth Circuit. In its opinion, the Fourth Circuit correctly recognized that where "[t]he district court declared unconstitutional the practice [at issue] . . . and granted injunctive relief," *Allen v. Burke*, 690 F.2d 376, 377 (4th Cir. 1982), that is, where the district court "ordered Defendants to comply with the law and safeguard Plaintiff's constitutional rights in the future," App. 22, attorney's fees were appropriate. This makes sense since it is only unlawful (here unconstitutional) behavior that can be enjoined. The Sherriff's Office's employees made it clear before Mr. Lefemine's lawsuit that they intended to continue with their unlawful conduct. But the relief Mr. Lefemine won altered their behavior.

As the above comparison shows, Mr. Lefemine is not the only plaintiff who will be affected by the new rule promulgated by the Fourth Circuit. Any and every civil rights plaintiff who sues a defendant who is entitled to an immunity defense *or* who is erroneously found to be entitled to such a defense—despite being among those Congress intended to be

eligible for attorney's fees awards—will no longer be able to obtain those awards. The number and variety of plaintiffs who will be impacted is almost without limit. Congress's explicit intent will be thwarted.

That would be reason enough to grant the Writ. However, as noted, the Fourth Circuit's judgment ignores this Court's carefully-worked-out and long-standing jurisprudence.

II. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FOURTH CIRCUIT'S JUDGMENT MISUNDERSTANDS AND IGNORES THIS COURT'S "PREVAILING PLAINTIFF" JURISPRUDENCE.

In support of its conclusion that Mr. Lefemine is not a prevailing party, the Fourth Circuit relied on a single erroneously decided opinion that it had not ever before cited for this point, *People Helpers Foundation, Inc. v. City of Richmond*, 12 F.3d 1321 (4th Cir. 1993). App. 21-22. The Fourth Circuit also quoted this Court's opinion in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 792 (1989): "'a technical victory may be so insignificant . . . as to be insufficient to support prevailing party status.'" (elipses in Fourth Circuit's opinion). App. 22. Finally, the Courth circuit noted that in *Hewitt v. Helms*, 482 U.S. 755, 763 (1987), this Court "found that a judicial determination that a plaintiff's civil rights had been violated, without more, was insufficient to render the plaintiff a 'prevailing party' and thereby entitle him to an award of attorney's fees." *Id.*

The fact that *People Helpers* was wrongly decided and that the Fourth Circuit misunderstood

Garland and *Hewitt*—both in *People Helpers* and in the instant case—can be demonstrated by the following quotation from *People Helpers*:

> Th[e] injunction [awarded in that case] prevents the City from coercing, harassing, intimidating, or interfering with People Helpers or its clients. The injunction does not, however, restrict legitimate conduct of the City, namely the enacting of city ordinances and other policies designed to effectively administer the City. People Helpers has the satisfaction of knowing that the City cannot harass it with discriminate maneuvers, but People Helpers is not immune from traditional governmental regulation. The distinction between valid regulation and discriminatory conduct is an important one because the Supreme Court has required us to examine the relative positions of the parties before and after the completion of litigation. According to *Texas State Teachers* [i.e., *Garland*] People Helpers must be able to point to a resolution of the dispute "which changes the legal relationship between itself and the defendant." Following the jury verdict and the entry of the permanent injunction, People Helpers is still under the direct authority of the City, which has the power to tax and regulate all nonprofit organizations, like People Helpers, in its jurisdiction. While People Helpers did obtain some form of relief,

> such relief has not altered the relative positions of the parties.
>
> . . . . Looking at the jury's verdict and the permanent injunction, we are not convinced that the final outcome has altered the relative positions of the parties as contemplated by the Supreme Court for purposes of determining a prevailing party.

12 F.3d at 1328-29.

The problem with this approach is that the Fourth Circuit failed to understand that *Garland's* statement of the prevailing party test ("the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant") was shorthand for a more fully stated test. Instead of finding that more fully stated test, the *People Helpers* court—and the *Lefemine* court—believed it was free to examine the *nature* of the change accomplished by the plaintiff's legal victory. If the plaintiff was still subject to *legitimate* control by the defendant, the Fourth Circuit believed the plaintiffs had not prevailed. But as already noted, lawful conduct will never be enjoined or declared unlawful.

The *People Helpers* court somehow missed multiple articulations of the prevailing party test.[5] First, this Court had already stated in *Hewitt v.*

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[5] Some of these quotations address only declaratory judgments, but their principles apply equally to suits in which declaratory judgments, injunctions, or both are awarded.

Helms, 482 U.S. 755, 761 (1987) (first emphasis added), that

> [i]n all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the *termination of some conduct*. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.

Second, this Court had already stated in *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) that "[a] declaratory judgment . . . is no different from any other judgment. It will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff."

Third, this Court had already stated in *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992), that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the *parties by modifying the defendant's behavior in a way that directly benefits the plaintiff*.

In both *People Helpers* and *Lefemine* the

defendants' behavior had changed. In *People Helpers*, the unlawful "coercing, harassing, intimidating, [and] interfering" was enjoined, 12 F.3d at 1328. Here, the Sherriff's Office's employees can no longer subject Mr. Lefemine to criminal sanctions if he uses his graphic signs. App. 50.

Even if the Fourth Circuit's confusion is somehow understandable in *People Helpers*,[6] its revival of that confusion in the instant case is harder to understand. After *People Helpers* but before *Lefemine*, this Court decided *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598 (2001), and connected the dots in unmistakable fashion: "*enforceable judgments on the merits* and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id.* at 604 (*quoting Garland*, 489 U.S. at 792-93). As the preceding parenthetical shows, the internal quotation in this passage from *Buckhannon* is the very *Garland* language that the *People Helpers* and *Lefemine* courts relied upon to deny attorney's fees. This Court's binding test informed the Fourth Circuit that Mr. Lefemine is a prevailing party. Yet the Fourth Circuit has created a new test that will deprive untold numbers of plaintiffs of their rightful fee awards, thus effectively repealing a portion of the Civil Right Attorney's Fees Award Act.

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[6] The *People Helpers* court's analysis of *Hewitt* is especially flawed and seems to be at the heart of its confusion. *See*, 12 F.3d at 1327-28.

This Court has always aggressively protected the definition of "prevailing plaintiff," both by refusing to include those who should not be included *and* by refusing to exclude those who should not be excluded. This has been true even where complete or near complete consensus existed. For example, in *Pulliam v. Allen*, where the Fourth Circuit and this Court both held that plaintiffs were entitled to an attorney's fee award, neither court ever addressed any authority holding the opposite, *i.e.*, that judicial immunity bars an award of attorney's fees. Further, this Court *explicitly* addressed the complete *unanimity* of the courts of Appeals on the underlying question of whether judges' conduct could be enjoined. See *Allen v. Burke*, 690 F.2d 376, 378-79 (4th Cir. 1982), *affirmed sub nom. Pulliam v. Allen*, 466 U.S. 522, 527-28 & n.7 (1984). Yet, this Court granted certiorari, not requiring a circuit split to exist at all prior to protecting the rights of prevailing plaintiffs.

On the other side of the coin, when this Court needed to exclude putative prevailing plaintiffs, it did not wait for a circuit split to percolate. Rather it granted certiorari in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598 (2001), when only a single circuit disagreed with a nine-circuit consensus. *See, id.* at 627 (Ginsburg, J., dissenting).

The Fourth Circuit's judgment in the instant case—which so clearly misunderstands and ignores this Court's prevailing plaintiff rule—also creates a single-circuit circuit split and also so threatens the very ability of civil rights plaintiffs to proceed with

litigation that this Court should grant the instant Writ and not wait for the split to percolate.

Nonetheless, the existing split will be examined in the next Section.

III. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FOURTH CIRCUIT'S HOLDING CREATES A CIRCUIT SPLIT ON THE PREVAILING PLAINTIFF TEST AND ON THE STANDARD OF REVIEW TO BE APPLIED TO THAT QUESTION.

Because, as documented in the prior Section, the Fourth Circuit's opinion misunderstands and ignores this Court's binding prevailing plaintiff jurisprudence, it is not surprising that the Fourth Circuit has created a circuit split with every other circuit regarding the proper test. It has also created a split with every other circuit regarding the standard of review. This Petition will examine each in turn.

A. The Fourth Circuit's Holding Creates a Circuit Split on the Prevailing Plaintiff Test.

At the outset, it is worth noting that the Fourth Circuit's opinion in the instant case is in conflict with five of its own prior published cases, which all employed the test as articulated in *Buckhannon*:

- *J.D. ex rel. Davis v. Kanawha County Bd. of Educ.*, 571 F.3d 381, 386 (4th Cir. 2009);

- *Grissom v. The Mills Corp.*, 549 F.3d 313, 319 (4th Cir. 2008);

- *Goldstein v. Moatz*, 445 F.3d 747, 751 (4th Cir. 2006);
- *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 274-75 (4th Cir. 2002); and

- *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 414 (4th Cir. 2001).[7]

However, because *People Helpers* was decided first, it controls the intra-circuit conflict: "When published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting *en banc* or the Supreme Court." McMellon v. United States, 387 F.3d 329, 333 (4th Cir. 2004) (*en banc*). Moverover, because this instant case was decided after *Buckhannon*, it represents the Fourth Circuit's view that *Buckhannon* does not serve as an intervening decision that in any way overrules *People Helpers*. Thus, in effect, the instant case transformed People Helpers from a wrongly decided, but five-times-ignored anomaly into a strongly re-affirmed flouting of this Court's binding precedent which creates a clear circuit split, as the following illustrative cases,

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[7] These cases involved various fee-shifting provisions but all used the Buckhannon test, on the authority of *Buckhannon* itself since this Court explained there that fee-shifting statutes should be interpreted consistently. 532 U.S. at 603 n.4. Other cases in the remainder of this Petition will also involve various fee-shifting provisions.

all of which employ the proper *Buckhannon* test demonstrate:

- First Circuit: *Smith v. Fitchburg Public Schools*, 401 F.3d 16, 23 (1st Cir. 2005);
- Second Circuit: *A.R. ex rel. R.V. v. New York City Dept. of Educ.*, 407 F.3d 65, 74-76 (2d 2005);
- Third Circuit: *Singer Management Consultants, Inc. v. Milgram*, 650 F.3d 223, 231 (3d Cir. 2011);
- Fifth Circuit: *Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008);
- Sixth Circuit: *Sierra Club v. Hamilton County Bd. of County Com'rs*, 504 F.3d 634, 653 n.8 (6th Cir. 2007);
- Seventh Circuit: *Bingham v. New Berlin School Dist.*, 550 F.3d 601, 602-04 (7th Cir. 2008);
- Eighth Circuit: *Rogers Group, Inc. v. City of Fayetteville, Ark.*, 683 F.3d 903, 909 (8th Cir. 2012);
- Ninth Circuit: *United States v. Milner*, 583 F.3d 1174, 1196 (9th Cir. 2009);
- Tenth Circuit: *Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226, 1229 (10th Cir. 2008);
- Eleventh Circuit: *Cook v. Randolph County, Ga.*, 573 F.3d 1143, 1155 (11th Cir. 2009);
- District of Columbia Circuit: *Davis v. Department*

of Justice, 460 F.3d 92, 105-06 (D.C. Cir. 2006); and

- Federal Circuit: *Ward v. U.S. Postal Service*, 672 F.3d 1294, 1297 (Fed. Cir.2012).

In sum, no other court of appeals engages in the Fourth Circuit's lawful/legitimate test; they all simply apply *Buckhannon*.

As noted previously, this Court has always aggressively protected the definition of "prevailing plaintiff," and there is no reason to wait to see whether another court of appeal will be attracted to the Fourth Circuit's gloss. Nor is there any reason, in cases where immunity defenses may be available, to uniquely force civil rights plaintiffs in the Fourth Circuit to try to attract competent counsel without being able to offer the prospect of attorney's fee awards. This split is reason enough to grant the Writ.

B. The Fourth Circuit's Holding Also Creates a Circuit Split on the Applicable Standard of Review.

The Fourth Circuit also created a circuit split concerning the standard of review to apply when examining whether a plaintiff has prevailed. The Fourth Circuit has previously applied a *de novo* standard to this question. *See, e.g., Goldstein v. Moatz,* 445 F.3d 747, 751 (4th Cir. 2006) ("Ordinarily, we review an award of attorney's fees for abuse of discretion. The designation of a party as a prevailing party, however, is a legal determination which we review *de novo*") (citations omitted).

However, in the instant case, the Fourth Circuit conflated the question of abuse of discretion in failing to award fees with the question of whether Mr. Lefemine is, in fact, a prevailing plaintiff, and declared that this conflated question is subject to abuse of discretion review:

> [I]n light of the lack of findings that Plaintiff was a prevailing party within the meaning of § 1988 as well as the absence of any other damages award, this ruling is consistent with the conclusion that the outcome of this litigation "has not altered the relative positions of the parties." *People Helpers*, 12 F.3d at 1329.
>
> Accordingly, we see no abuse of discretion in this ruling and thus affirm the district court's denial of attorney's fees to Plaintiff.

App. 23.

No other court of appeals has similarly conflated the analysis (which makes sense since no other court of appeals has deviated from the *Buckhannon* test). Thus, every other court of appeals applies the *de novo* standard of review to the question of whether a plaintiff has prevailed, as the following illustrative cases demonstrate[8]:

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[8] The cases for the Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits come from *Bailey v. Mississippi*, 407 F.3d 684, 687, (5th Cir. 2005), which is the case listed for the Fifth Circuit and in which that court compiled

- First Circuit: *Hutchinson ex rel. Julien v. Patrick*, 636 F.3d 1, 8 (1st Cir. 2011);

- Second Circuit: *Preserv. Coal. v. Fed. Transit Admin.*, 356 F.3d 444, 450 (2d Cir.2004);
- Third Circuit: *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 163 (3d Cir.2002);

- Fifth Circuit: *Bailey v. Mississippi*, 407 F.3d 684, 687, (5th Cir. 2005);

- Sixth Circuit: *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 619 (6th Cir. 2007);

- Seventh Circuit: *Palmetto Props., Inc. v. County of DuPage*, 375 F.3d 542, 547 (7th Cir.2004);

- Eighth Circuit: *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 992 (8th Cir.2003);

- Ninth Circuit: *Richard S. v. Dep't of Developmental Servs.*, 317 F.3d 1080, 1085-86 (9th Cir.2003);

- Tenth Circuit: *Kansas Judicial Watch v. Stout*,

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cases for those courts of appeals that had already explicitly adopted the *de novo* standard by 2005 and in which it adopted that standard for itself: "Post-*Buckhannon*, every Circuit to address the issue has determined that the characterization of prevailing-party status for awards under fee-shifting statutes such as § 1988 is a legal question subject to *de novo* review. This Court agrees that, post-*Buckhannon*, we will review such question *de novo*." *Id.* (footnote omitted).

653 F.3d 1230, 1235 (10th Cir. 2011);

- Eleventh Circuit: *Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co., Ltd.*, 254 F.3d 987, 1012 (11th Cir.2001);

- District of Columbia Circuit: *Turner v. National Transp. Safety Bd.*, 608 F.3d 12, 14 (D.C. Cir. 2010); and

- Federal Circuit: *Shum v. Intel Corp.*, 629 F.3d 1360, 1366 (Fed. Cir. 2010).

While this circuit split may seem (or may actually be) less significant than the Fourth Circuit's confusion over of this Court's binding prevailing plaintiff precedent, this split still represents an important reason to grant the Writ. Should any other court of appeals seek to follow the Fourth Circuit in its test, the abuse of discretion standard will allow it to do so. Similarly, should another court of appeal decide to deviate from *Buckhannon* in any other way, the idea that its approach is subject to the abuse of discretion standard may erroneously facilitate that deviation. Finally, the standard of review question and the creation of the Fourth Circuit's new prevailing plaintiff test really go hand-in-hand; this Court should address them together.

CONCLUSION

Because the Fourth Circuit variously misapplied or ignored this Court's carefully-worked-out and long-standing jurisprudence, because the Fourth Circuit conflated the issues before it,

because these mistakes created two circuit splits, because these mistakes will make it harder for civil rights plaintiffs in the Fourth Circuit to obtain competent counsel, and because this Court has always aggressively protected the definition of "prevailing plaintiff"; Mr. Lefemine respectfully requests that this Court grant the Writ.

Respectfully Submitted,
this 31st day July, 2012

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APPENDIX

FILED: April 2, 2012

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1905 (L)
(8:08-cv-03638-HMH)

STEVEN LEFEMINE, d/b/a Columbia Christians for Life

Plaintiff - Appellant

v.

DAN WIDEMAN, individually and in his official capacity; MIKE FREDERICK, individually and in his official capacity; LONNIE SMITH, individually and in his official capacity; BRANDON STRICKLAND, individually and in his official capacity; TONY DAVIS, Sheriff, in his official capacity

Defendants - Appellees

No. 10-2014
(8:08-cv-03638-HMH)

STEVEN LEFEMINE, d/b/a Columbia Christians for Life

Plaintiff - Appellee

v.

MIKE FREDERICK, individually and in his official capacity

Defendant - Appellant

and

DAN WIDEMAN, individually and in his official

capacity; LONNIE SMITH, individually and in his official capacity; BRANDON STRICKLAND, individually and in his official capacity; TONY DAVIS, Sheriff, in his official capacity

Defendants

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Duncan, Judge Wynn and Judge Diaz.

For the Court
/s/Patricia S. Connor, Clerk

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEVEN LEFEMINE, d/b/a Columbia Christians for Life,
Plaintiff-Appellant,

v.

DAN WIDEMAN, individually and in his official capacity; MIKE FREDERICK, individually and in his official capacity; LONNIE SMITH, individually and in his official capacity; BRANDON STRICKLAND, individually and in his official capacity; TONY DAVIS, Sheriff, in his official capacity,
Defendants-Appellees.

No. 10-1905

Appeals from the United States District Court
for the District of South Carolina, at Anderson.
Henry M. Herlong, Jr., Senior District Judge.
(8:08-cv-03638-HMH)

Argued: November 8, 2011

Decided: March 5, 2012

Before DUNCAN, WYNN, and DIAZ, Circuit Judges.

Affirmed by published opinion. Judge Wynn wrote the opinion, in which Judge Duncan and Judge Diaz joined.

COUNSEL

ARGUED: Steven W. Fitschen, NATIONAL LEGAL FOUNDATION, Virginia Beach, Virginia, for Appellant/Cross-Appellee. Andrew Lindemann, DAVIDSON & LINDEMANN, PA, Columbia, South Carolina, for Appellees/Cross-Appellant. **ON BRIEF:** Douglas E. Myers, NATIONAL LEGAL FOUNDATION, Virginia Beach, Virginia, for Appellant/Cross-Appellee. Robert D. Garfield, DAVIDSON & LINDEMANN, PA, Columbia, South Carolina, for Appellee/Cross-Appellant Mike Frederick. Russell W. Harter, Jr., CHAPMAN, HARTER & GROVES, P.A., Greenville, South Carolina, for Appellees Wideman, Smith, Strickland, and Davis.

OPINION

WYNN, Circuit Judge:

In November 2005, Steven C. Lefemine and

members of Columbia Christians for Life ("Plaintiff"), a South Carolina anti-abortion organization, were asked by employees of the Greenwood County Sheriff's Department ("Defendants") to remove large, graphic signs depicting aborted fetuses that they were using as part of a roadside demonstration. As the sole proprietor of Columbia Christians for Life, Lefemine subsequently brought an action under 18 U.S.C. § 1983 against Defendants in their individual and official capacities, alleging violations of his and Columbia Christians for Life members' First Amendment rights. The complaint sought injunctive and declaratory relief, damages, and attorney's fees under 18 U.S.C. § 1988.

Concluding that Defendants had violated Plaintiff's First Amendment rights, the district court entered summary judgment in favor of Plaintiff on those claims. Nonetheless, the district court held that Defendants were entitled to qualified immunity from suit in their individual capacities because the specific rights at issue were not clearly established at the time of the violations. In addition, the district court denied Plaintiff's request for attorney's fees but granted Plaintiff injunctive relief.

Plaintiff and Defendants cross-appeal different portions of the district court's opinion and order. For the reasons that follow, we affirm.

I.

The basic facts underlying this cause of action are not in dispute. Plaintiff is an organization that "actively seeks to raise public awareness of the horrors of abortion throughout the State of South

Carolina." J.A. 19.[1] Pursuant to this mission, Plaintiff's members regularly "preach and carry signs critical of abortion in many public fora throughout the State of South Carolina," signs which Plaintiff explains "depict aborted babies in order to shock the consciences of those who see the signs to the horror of abortion." J.A. 19.

On November 3, 2005, as part of its "Show the Truth Tour" around South Carolina, about twenty of Plaintiff's members stopped in Greenwood County and "began to establish a Christian pro-life witness on the public sidewalks at the intersection of Montague Street and U.S. 25/S.C. 72 Bypass," which is the "busiest intersection" in Greenwood County. J.A. 19-20, 65. They began preaching, distributing anti-abortion literature, and carrying large anti-abortion signs, including several with color photographs of aborted and mutilated fetuses, later described as "graphic" by Plaintiff in its own complaint.

Shortly after the start of Plaintiff's demonstration, Major Lonnie Smith of the Greenwood County Sheriff's Office, an individually named defendant in this lawsuit, received a phone call from Lieutenant Randy Miles, notifying him of complaints that had been received from motorists driving by the intersection. In a later deposition, Major Smith stated that he was informed that protesters were in the roadway with the signs, and that one mother had called to say that her five-year-

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[1] Pagination for citations to the record refer to the joint appendix ("J.A.").

old son was "screaming, crying" after seeing the signs. J.A. 360. Major Smith and Deputy Brandon Strickland, another named defendant, proceeded to the intersection to investigate further.

In the meantime, Lieutenant Miles approached Lefemine to tell him about the "complaints about the graphic photographs and this was causing a disturbance in the traffic flow at th[e] intersections." J.A. 360. Major Smith observed the individuals holding signs and megaphones, and Deputy Strickland took several pictures of the scene. Major Smith called Chief Deputy Mike Frederick, also a named defendant, to report the events to him. Chief Deputy Frederick directed him to tell Plaintiff's members that because of the complaints about the graphic pictures, "they could continue to protest but they would either have to put away or take down the signs or . . . possibly be ticketed for breach of peace." J.A. 361. The transcript of the ensuing conversation between Major Smith and Lefemine, as quoted in the district court's opinion and order, indicates that Major Smith mentioned only the complaints about the graphic nature of the photographs and not any traffic or safety concerns when he spoke to Lefemine.

Lefemine responded that the Sheriff's Office was violating Plaintiff's First Amendment rights, to which Major Smith replied, "You do not have a right to be offensive to other people in that manner," though he also maintained that Plaintiff's members only needed to take the signs down but could remain on the sidewalk. J.A. 362. Following the conversation, Plaintiff's members packed up their signs and left shortly thereafter.

A year later, an attorney for Plaintiff sent a letter to Sheriff Dan Wideman, also a named defendant, informing him that Plaintiff's members intended to return to Greenwood County "in the near future to exercise their First Amendment freedoms by highlighting the national tragedy of abortion." J.A. 362. The letter included a warning that "any further interference with Columbia Christians for Life's message" by the Greenwood County Sheriff's Office would "leave [Plaintiff] no choice but to pursue all available legal remedies."[2] J.A. 362. Chief Deputy Frederick answered that the Department's actions in 2005 were based on Plaintiff's methodology, not its content, and "should we observe any protester or demonstrator committing the same act, we will again conduct ourselves in exactly the same manner: order the person(s) to stop or face criminal sanctions." J.A. 363. Subsequent demonstrations by Plaintiff on the city side of the intersection in 2006 and 2007 occurred without incident.

On October 31, 2008, Plaintiff filed a complaint against Wideman, Frederick, Smith, and Strickland, alleging violations of his First Amendment rights. Plaintiff amended the complaint on February 27, 2009, to include Sheriff Tony Davis, who had been elected to replace Wideman, as a defendant. Following cross-motions for summary judgment, as well as motions in opposition from all parties, the district court held a hearing on June 23, 2010.

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[2] A similar letter was sent to the Chief of the City of Greenwood Police Department, who responded that Plaintiff was welcome to visit and protest.

On July 8, 2010, the district court entered an opinion and order finding that Defendants had infringed on Plaintiff's First Amendment rights to free speech, peaceable assembly, and free exercise of religion, but were entitled to qualified immunity for their actions. The district court declined to award Plaintiff attorney's fees but did enjoin Defendants "from engaging in content-based restrictions on Plaintiff's display of graphic signs without narrowly tailoring its restriction to serve a compelling state interest." J.A. 378.

II.

Although the parties have filed cross-appeals, no one challenges the fundamental conclusion that Defendants' actions were an impermissible content-based restriction on Plaintiff's First Amendments rights. Accordingly, for purposes of this appeal, we accept—as we must—the premise that Defendants' actions were an impermissible content-based restriction on Plaintiff's First Amendments rights. *See generally Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999) (citing Fed. R. App. P. 28(a)(9)(A) and noting that issues not briefed or argued on appeal are deemed abandoned). However, in so doing, we pass no judgment on whether the district court was correct in its determination.

On appeal, Plaintiff contends that the district court (1) erred in granting Defendants qualified immunity; (2) abused its discretion by failing to rule on Plaintiff's request for declaratory relief; and (3) abused its discretion by failing to award Plaintiff

attorney's fees. Defendants assert only that the district court erred in awarding prospective injunctive relief against Frederick, who is no longer employed by the Greenwood County Sheriff's Office. We address each of these issues in turn.

A.

First, Plaintiff argues that the district court erred by granting Defendants qualified immunity, asserting that they violated a clearly established right, and reasonable officers should have known that their actions violated that right. We review de novo the district court's rulings on the parties' respective motions for summary judgment on grounds of qualified immunity. *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992).

The doctrine of qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks and citation omitted); *see also Saucier v. Katz*, 533 U.S. 194, 202 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."), *overruled in part on other grounds by Pearson*, 555 U.S. at 236.

Further guiding our analysis, the Supreme Court has
stated:

> Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.

Pearson, 555 U.S. at 231 (internal quotation marks and citation omitted). Thus, a defense of qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Waterman v. Batton*, 393 F.3d 471, 476 (4th Cir. 2005) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *Pearson*, 555 U.S. at 244 ("The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law.").

When determining if a right is clearly established at the time of the alleged infringement, we are faced first with the critical determination of the nature itself of the right at issue. To characterize the right too broadly would upset the delicate balance "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties by making it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (internal quotation marks, alteration, and citation omitted).

Accordingly, we must "define the right in light of the specific context of the case, not as a broad general proposition . . . . that is, [whether it was] clear to a reasonable officer that the conduct in which he allegedly engaged was unlawful in the situation he confronted." *McKinney v. Richland Cnty. Sheriff's Dep't*, 431 F.3d 415, 417 (4th Cir. 2005) (internal quotation marks and citation omitted); *Jackson v. Long*, 102 F.3d 722, 728 (4th Cir. 1996) ("To determine whether a federal right was clearly established at the time of the defendants' alleged conduct, we focus not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged." (internal quotation marks and citation omitted)).

We note as well that we have long held that it is case law from this Circuit and the Supreme Court that provide notice of whether a right is clearly established:

> In determining whether a right was clearly established at the time of the claimed violation, courts in this circuit ordinarily need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose. . . . If a right is recognized in some other circuit, but not in this one, an official will ordinarily retain the immunity defense.

Edwards, 178 F.3d at 251 (internal quotation marks, alterations, and citation omitted).

Turning to the situation faced by Defendants

in this case, contrary to Plaintiff's assertion that the right at issue here should be framed as whether it was clearly established that law enforcement is barred from giving vent to a heckler's veto,[3] such a broad construction would unquestionably run afoul of the interest-balancing inherent in qualified immunity analysis.[4] Rather, we agree with

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[3] This Court has described the "heckler's veto" as "[h]istorically, one of the most persistent and insidious threats to first amendment rights," and defined it as "the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order." *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985); *see also Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."). "Government's instinctive and understandable impulse to buy its peace—to avoid all risks of public disorder by chilling speech assertedly or demonstrably offensive to some elements of the public—is a recurring theme in first amendment litigation." *Berger*, 779 F.2d at 1001.

[4] Were we to define the right at stake in this case as Plaintiff urges, we would potentially hamstring law enforcement officials in the proper and legitimate exercise of their power to enforce public safety, including when those efforts may be narrowly tailored in recognition that content-based restrictions on speech will be strictly scrutinized. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (reciting the standard of review for content-based restrictions on speech).

Put another way, while true that there is a clearly established right to be free from prohibitions, restrictions and burdens on expression based solely on the heckler's veto, we must also be cognizant that "[t]he rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox v. Lousiana*, 379 U.S. 536, 554 (1965). Rather, governmental entities retain the

Defendants—and the district court—that the issue here is properly framed as whether, at the time of Plaintiff's 2005 anti-abortion demonstration in Greenwood County, it was clearly established that law enforcement officers could not proscribe the display of large, graphic photographs in a traditional public forum.[5] We find that it was not.

In November 2005, the case law from this Court and the Supreme Court was ambiguous concerning whether asking demonstrators to remove such signs would be an impermissible infringement of their First Amendment rights. For example, there was no clear holding concerning whether such restrictions might be deemed content-based or content-neutral, a sometimes difficult and thorny question. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) ("Deciding whether a particular regulation is content based or content neutral is not always a simple task."); *see also Ovadal v. City of Madison, Wis.*, 469 F.3d 625, 630 (7th Cir. 2006) (noting the fine distinction between a restriction to alleviate traffic concerns that is content-neutral if due to the distracting *presence* of protesters with such signs, but content-based if the *message* was

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right to regulate the use of public streets to protect legitimate government interests in maintaining public order and avoiding violence, *id.* at 554-55, though in the case of content-based restrictions, such regulation must be narrowly drawn to serve compelling government interests, *Perry*, 460 U.S. at 45.

[5] In this case, no party challenges the district court's determination that Plaintiff's First Amendment rights were violated by Defendants' conduct. As such, we assume without deciding that the district court's holding on that question is correct.

what angered and distracted drivers).[6]

Indeed, as of November 2005, the Supreme Court had issued at least one opinion concerning anti-abortion protests suggesting that certain restrictions, even if made in response to the graphic and offensive nature of images to the viewer, might still be deemed content-neutral:

> The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience. But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. Indeed, *it may not be the content of the speech, as much as the deliberate verbal or visual assault, that justifies proscription.* Even in a public forum, one of the reasons we tolerate a protester's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can effectively avoid further bombardment of their sensibilities simply by averting their eyes.

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[6] As noted above, because this issue is not before us on appeal, it remains today an open question in this Circuit. However, it is also persuasive, though not controlling, that by 2005, at least two other circuit courts had found similar restrictions on large, graphic signs in heavily trafficked areas to be content-neutral, not content-based. *See Frye v. Kansas City Mo. Police Dep't*, 375 F.3d 785, 791-92 (8th Cir. 2004); *Foti v. City of Menlo Park*, 146 F.3d 629, 641 (9th Cir. 1998).

Hill v. Colorado, 530 U.S. 703, 716 (2000) (emphasis added) (internal quotation marks and citations omitted); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech." (internal citations and quotations marks omitted)).

Additionally, even if Defendants should have been aware that they were engaging in content-based restrictions, subject to strict scrutiny, at that point in time, this Court had indicated in at least one anti-abortion protest case that "the State may act to protect its substantial and legitimate interest in traffic safety." *Lytle v. Doyle*, 326 F.3d 463, 470 (4th Cir. 2003); *see also Hill*, 530 U.S. at 715 ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens." (internal quotation marks and citation omitted)).

Likewise, the Supreme Court has repeatedly "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors," including from certain types of speech that may not be inappropriate for adults. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Further, the Supreme Court has "regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *United States v. Grace*, 461 U.S. 171,

177-78 (1983) (internal quotation marks and citation omitted).

Given this state of the law in 2005, it was not objectively unreasonable for Defendants to believe they could allow Plaintiff to continue its protest, but nevertheless remove the graphic signs in order to protect the public from potential traffic hazards based on the signs' proximity to the road and to prevent children from seeing the images. The record reflects that Major Smith approached Lefemine after Chief Deputy Frederick directed him to tell Plaintiff's members that "they could continue to protest but that they would either have to put away or take down the signs" because of the complaints. J.A. 361.

According to Chief Deputy Frederick's deposition, his instructions were "strictly based" on what he heard from Major Smith and Lieutenant Miles, and "[t]he message was an afterthought. The content was an afterthought." J.A. 91. He maintained that he based his decision on his belief that "the significant interest in the safety of these motorists who happened by the protest clearly outweighed the very minor burden to [Columbia Christians for Life's] free speech rights when we ordered them to stop presenting the incredibly graphic signs to the roadway." J.A. 90. In particular, he recalled that he was concerned by "the combination of [the signs'] graphic nature and their proximity to the roadway," J.A. 77, and referred to "their right to stand six inches from the roadway and conduct themselves as they were," J.A. 290.

We cannot say from these statements that

Defendants were either "plainly incompetent" or "knowingly violat[ing] the law," *Waterman*, 393 F.3d at 476, such that they should be denied qualified immunity for what the district court ultimately determined to be a mistaken judgment. Defendants believed they were acting in a content-neutral manner to safeguard legitimate, compelling government interests. We will not find such "[o]fficials . . . liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

For the foregoing reasons, we affirm the district court's grant of summary judgment on grounds of qualified immunity to Defendants in their individual capacities.

B.

Next, Plaintiff argues that the district court abused its discretion by failing to rule on its request for declaratory relief. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 289-90 (1995) (stating that the decision to rule on an action for declaratory relief will be reviewed for an abuse of discretion); *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 493 (4th Cir. 1998) (same). However, as we read the district court's order and opinion, Plaintiff was indeed awarded summary judgment on its request for a declaratory judgment that Defendants' actions were an unconstitutional infringement on its First Amendment rights.

Plaintiff's motion for summary judgment specifically requested the following: (1) a judgment and decree declaring that Defendants' actions were

an unconstitutional infringement of Plaintiff's First Amendment rights; (2) "a permanent injunction enjoining the Sheriff from applying their unconstitutional policy prohibiting [Columbia Christians for Life] from displaying pro-life signs in the public *fora* of Greenwood County"; (3) nominal damages; and (4) costs and attorney's fees.

In turn, the district court's order states that Defendants' motions for summary judgment are granted in part and denied in part; Plaintiff's motion for summary judgment is also granted in part and denied in part; Plaintiff's request for attorney's fees is denied; and Defendants are "enjoined from engaging in content-based restrictions on Plaintiff's display of graphic signs without narrowly tailoring its restriction to serve a compelling state interest." J.A. 378.

Reconciling these two documents with the specific holdings on each issue in the district court's opinion, it is clear that the reference to granting summary judgment in part to Plaintiff must necessarily refer to Plaintiff's request for a declaratory judgment that its First Amendment rights were infringed. The injunction issued by the district court did not follow the language employed by Plaintiff in its motion for summary judgment, while the opinion and order concludes that Plaintiff's First Amendment rights were violated by Defendants' actions.

Further, we can discern no abuse of discretion in the district court's decision not to make the declaratory judgment more explicit, as Plaintiff unmistakably achieved judicial recognition that its

constitutional rights had been violated. A remand for an additional judgment to that effect seems unnecessarily duplicative and wasteful of judicial resources, as well as improper in light of the district court's discretion to rule on such a request.

C.

Finally, Plaintiff argues that the district court abused its discretion by failing to award it attorney's fees. Plaintiff maintains that it was the prevailing party in this § 1983 action and that as such it should "ordinarily recover attorney's fees unless special circumstances would render such an award unjust." *People Helpers Found., Inc. v. City of Richmond, Va.*, 12 F.3d 1321, 1327 (4th Cir. 1993).

We review the district court's decision regarding the award of attorney's fees for an abuse of discretion. *See* 42 U.S.C. § 1988(b) (2009) (providing that in an action brought under § 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs"); *People for Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 370 (4th Cir. 2001). "A trial court abuses its discretion only if its conclusions are based on mistaken legal principles or clearly erroneous factual findings." *Id.* (citation omitted).

The Supreme Court has held that generally "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Tex. State Teachers Ass'n v. Garland Indep. Sch.*

Dist., 489 U.S. 782, 789 (1989) (internal quotation marks and citation omitted). "[A]t a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792 (citations omitted); *see also People Helpers*, 12 F.3d at 1327-29 (citing and applying this language). "Beyond this absolute limitation, a technical victory may be so insignificant . . . as to be insufficient to support prevailing party status." *Tex. State Teachers*, 489 U.S. at 792.

In at least one case, the Supreme Court has found that a judicial determination that a plaintiff's civil rights had been violated, without more, was insufficient to render the plaintiff a "prevailing party" and thereby entitle him to an award of attorney's fees. *Hewitt v. Helms*, 482 U.S. 755, 763 (1987); *see also People Helpers*, 12 F.3d at 1327-29 (vacating an award for attorney's fees because the injunctive relief won by the plaintiff, which prohibited unlawful, but not legitimate, conduct by the defendant, "has not altered the relative positions of the parties").

Similarly, in this case, Plaintiff was awarded injunctive relief against Defendants, prohibiting them from "engaging in content-based restrictions on Plaintiff's display of graphic signs without narrowly tailoring its restriction to serve a compelling state interest." J.A. 378. Put simply, the district court ordered Defendants to comply with the law and safeguard Plaintiff's constitutional rights in the future. No other damages were awarded.

The sole statement in the district court's opinion and order regarding attorney's fees reads as follows: "Under the totality of the facts in this case the award of attorney's fees is not warranted." J.A. 378. Although perhaps somewhat conclusory, when read in the context of the order as a whole, we do not find that the district court's "conclusions are based on mistaken legal principles or clearly erroneous factual findings." *Doughney*, 263 F.3d at 370. Rather, in light of the lack of findings that Plaintiff was a prevailing party within the meaning of § 1988 as well as the absence of any other damages award, this ruling is consistent with the conclusion that the outcome of this litigation "has not altered the relative positions of the parties." *People Helpers*, 12 F.3d at 1329.

Accordingly, we see no abuse of discretion in this ruling and thus affirm the district court's denial of attorney's fees to Plaintiff.

D.

Defendants' sole issue on cross-appeal is that the district court erred in granting injunctive relief against Chief Deputy Frederick, who is no longer employed by the Greenwood County Sheriff's Office. In addition, according to Defendants, the award of injunctive relief against each of them in their individual capacities "should be considered dismissed as a duplicative claim," and injunctive relief against them in their official capacities "should be deemed dismissed under the law of the case."

At the outset, we note that despite Defendants' use of the term "erred," we review the district court's

decision to grant or deny injunctive relief for an abuse of discretion. *US Airline Pilots Ass'n v. Awappa, LLC*, 615 F.3d 312, 320 (4th Cir. 2010).

As previously stated, the decretal portion of the district court's opinion and order provides that "Defendants are enjoined from engaging in content-based restrictions on Plaintiff's display of graphic signs without narrowly tailoring its restriction to serve a compelling state interest." J.A. 378. The district court did not specify if "Defendants" referred to each person in his individual or official capacity. However, the section discussing Plaintiff's claims against Defendants in their official capacities states that those claims "are merely claims against the Greenwood County Sheriff's Office," but because Plaintiff failed to make a showing that the Office itself had a policy or custom to violate a citizen's First Amendment rights, "Defendants are immune from suit in their official capacity." J.A. 377.

The district court appears to have been analyzing whether Defendants might be liable for damages, not whether they could be subject to an injunction in either their official or individual capacities. Claims for declaratory and injunctive relief are not affected by qualified immunity. *Roller v. Cavanaugh*, 984 F.2d 120, 122 (4th Cir. 1993), *overruled in part on other grounds by Ca. Dep't of Corr. v. Morales*, 514 U.S. 499 (1995); *see also Pearson*, 555 U.S. at 242 (noting that defense of qualified immunity is not available in "§ 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages"). Likewise, under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), injunctive relief against a state officer in his

official capacity may be appropriate if "the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (internal quotation marks and citation omitted).

Although Defendants contend that the termination of Frederick's employment with the Greenwood County Sheriff's Office means there is no "cognizable danger of recurrent violation," *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), he is nonetheless still a police officer, albeit elsewhere in South Carolina. As such, the danger remains.

We see no abuse of discretion in the district court's decision to order Defendants to safeguard Plaintiff's First Amendment rights and refrain from impermissible content-based restrictions in the future. We affirm this portion of the district court's opinion and order.

III.

In sum, we affirm the district court's grant of summary judgment to Defendants on grounds of qualified immunity, the denial of an award of attorney's fees to Plaintiff, and the grant of injunctive relief to Plaintiff against Defendants.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Steven C. Lefemine, d/b/a Columbia Christians for Life, Plaintiff vs. Tony Davis, Sheriff, in his official capacity; Dan Wideman, individually and in his official capacity; Mike Frederick, individually and in his official capacity; Lonnie Smith, individually and in his official capacity; Brandon Strickland, individually and in his official capacity, Defendants.	C.A. No. 8:08-3638-HMH **OPINION & ORDER**

This matter is before the court on the parties' cross motions for summary judgment. For the reasons set forth below, the court grants in part and denies in part Plaintiff's motion for summary judgment and grants in part and denies in part Defendants' motions for summary judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter arises out of an incident that occurred on November 3, 2005, in Greenwood County, South Carolina. (Am. Compl. ¶ 23.) Plaintiff,

Steven C. Lefemine, is the sole proprietor of Columbia Christians for Life ("CCL"), an organization that "actively seeks to raise public awareness of the horrors of abortion throughout the State of South Carolina." (Id. ¶ 17.) In order to fulfill CCL's mission, Plaintiff "and other like-minded persons, preach and carry signs" which "depict aborted babies in order to shock the consciences of those who see the signs to the horror of abortion." (Id. ¶¶ 19-20.) On "Thursday, November 3, 2005 at approximately 3:45 p.m., [] [Plaintiff] and about twenty other individuals began to establish a Christian pro-life witness" in Greenwood County, South Carolina. (Id. ¶ 23.) Specifically, the demonstration took place at the intersection of U.S. Highway 25 North and the S.C. 72 Bypass ("the intersection") which is "the busiest intersection in [Greenwood] County." (Defs. Mem. Supp. Summ. J. Attach. 6 (Mike Frederick ("Chief Deputy Frederick") Dep. 16).)

During the demonstration, Major Lonnie Smith ("Major Smith") received a telephone call from Lieutenant Randy Miles ("Lt. Miles") notifying him of complaints that had been received from motorists driving near the intersection. (Id. Attach. 8 (Major Smith Dep. 15).) In particular, Major Smith was informed that protestors were in the roadway holding graphic signs and one mother called saying that her son "was in the back seat screaming, crying because [he] had seen those signs." (Id. Attach. 8 (Major Smith Dep. 17).) Major Smith proceeded to the intersection to investigate. Deputy Brandon Strickland ("Deputy Strickland") also proceeded to the intersection to serve as backup after hearing of the complaints over the dispatch. (Id. Attach. 9

(Deputy Strickland Dep. 17).)

Prior to Major Smith or Deputy Strickland's arrival at the intersection, Lt. Miles informed Plaintiff that he "had several complaints about the graphic photographs and this was causing a disturbance in the traffic flow at th[e] intersection." (Id. Attach. 2 (Incident Report).) When Major Smith arrived at the intersection, he observed a number of individuals holding signs and megaphones. (Defs. Mem. Supp. Summ. J. Attach. 8 (Major Smith Dep. 21-22).) Major Smith requested that Deputy Strickland take multiple pictures of the scene. Prior to approaching the CCL members, Major Smith called Chief Deputy Frederick to report the events occurring at the intersection. (Id. Attach. 8 (Major Smith Dep. 22).) According to Major Smith, Chief Deputy Frederick informed him that "if we were getting complaints and these signs are graphic and people in the community were complaining, then we were to tell [them] that they could continue to protest but they would either have to put away or take down the signs or . . . possibly be ticketed for breach of peace." (Id. Attach. 8 (Major Smith Dep. 22).)

Major Smith then approached Plaintiff and the following conversation ensued, in part:

Major Smith: How are you doing, sir?

Lefemine: Alright, sir, how are you?

Major Smith: Lonnie Smith with Greenwood County Sheriff's Office.

Lefemine: Steve Lefemine.

Major Smith: OK, we have a number of complaints from people that find this offensive and . . . they don't want this on the street. So, at this time, I'm gonna ask you to put them up, OK? Put these signs up, because you can't distinguish what age of people are seein' these signs. OK, I'm asking you to put 'em up and go ahead, and if you want to stand out here on the corner, that's fine, but we cannot have these signs up because people do consider this is offensive material. OK?

Lefemine: Major Smith, if you're ordering us to leave under threat of arrest or being ticketed, we will leave, but I want you to know you're violating our constitutional right [**Major Smith**: OK] because you're discriminating based upon content of our signs.

Major Smith: Right, people do find this offensive, and this is an offensive manner, OK? This is offensive because you've got small children–you've got different ones that are seeing this. We have had so many complaints about people that this is offensive . . . . You're free to stay here, whatever, but we can't have these type of signs up where people can see 'em.

Lefemine: We will leave if you're ordering us to leave under threat of being ticked or being arrested . . . . Being offensive is not a basis for violating First Amendment rights. . . .

Major Smith: You do not have a right to be offensive to other people in that manner.

. . . .

Major Smith: . . . I'm asking you if you will please take the signs down. If you do not take the signs down we will have no other choice we're gonna ticket you for breach of peace.

Lefemine: . . . . These are not obscene signs.

. . . .

Major Smith: And I'm not saying you gotta leave the sidewalk. I'm not sayin' that. I'm just sayin' you got to put these signs down.

. . . .

Major Smith: Like I said, this is the last warning. You can either go ahead and put 'em down or [I'll] ticket you.

Lefemine (to others in the group): Go ahead and remove the signs, he's violating our constitutional rights. Go remove the signs. . . remove the signs.

(Id. Attach. 3 (Transcript).) Following the conversation with Major Smith, Plaintiff and the other members of the CCL "packed up their signs and left shortly thereafter." (Am. Compl. ¶ 35.)

On November 13, 2006, an attorney from the National Legal Foundation ("NLF") wrote a letter to

Sheriff Dan Wideman ("Sheriff Wideman") of Greenwood County to inform Sheriff Wideman that "CCL volunteers will be returning to the Greenwood area in the near future to exercise their First Amendment freedoms by highlighting the national tragedy of abortion." (Pl. Mem. Supp. Summ. J. Ex. 5 (Nov. 13, 2006 Letter to Sheriff).) The letter continued to state that Sheriff Wideman was "hereby put on notice that any further interference with CCL's message by you or your officers will leave us no choice but to pursue all available legal remedies without further notice." (Id. Ex. 5 (Nov. 13, 2006 Letter to Sheriff).) The NLF lawyers also mailed the same letter to Chief of Police Gerald Brooks ("Chief Brooks") of the City of Greenwood Police Department. (Id. Ex. 6 (Nov. 13, 2006 Letter to Police Dept.).)

On November 17, 2006, Chief Brooks responded to the NLF's letter stating that CCL was welcome to visit the community and exercise their rights as there are "many public places where CCL can park, assemble, and convey their message." (Id. Ex. 7 (Nov. 17, 2006 Letter).) On November 28, 2006, Chief Deputy Frederick responded to the NLF stating, in part, that Major Smith's response in 2005 was based on CCL's methodology not their content and "should we observe any protester or demonstrator committing the same act, we will again conduct ourselves in exactly the same manner: order the person(s) to stop or face criminal sanctions." (Id. Ex. 8 (Nov. 28, 2006 Letter).) On November 25, 2006, Plaintiff "and others held their pro-life demonstration on the Greenwood city side of U.S. 25/S.C. 72 Bypass for fear of criminal sanctions from Greenwood County." (Am. Compl. ¶ 40.) No problems

occurred during this demonstration.

CCL held another pro-life demonstration in 2007 "on the Greenwood city side of U.S. 25/S.C. 72 Bypass for fear of criminal sanctions from Greenwood County." (Id. ¶ 42.) Plaintiff currently desires to conduct a "Show the Truth Tour" in Greenwood County but alleges that he fears criminal prosecution. (Id. ¶¶ 43-44.)

Plaintiff filed a complaint against Sheriff Wideman, former Chief Deputy Frederick, Major Smith, and Deputy Strickland on October 31, 2008, alleging violations of his First Amendment rights. On February 27, 2009, Plaintiff filed an amended complaint adding Sheriff Tony Davis ("Sheriff Davis") as a Defendant. On April 5, 2010, Sheriff Davis, Major Smith, Deputy Strickland, and Sheriff Wideman filed a motion for summary judgment. On the same day, Plaintiff filed a motion for summary judgment. On April 9, 2010, former Chief Deputy Frederick filed a motion for summary judgment. Sheriff Davis, Major Smith, Deputy Strickland, and Sheriff Wideman filed a memorandum in opposition of Plaintiff's motion for summary judgment on April 22, 2010. On the same day, Plaintiff filed a memorandum in opposition of Defendants' motion for summary judgment. Former Chief Deputy Frederick filed a memorandum in opposition to Plaintiff's motion for summary judgment on April 26, 2010. On the same day, Plaintiff filed a memorandum in opposition to Chief Deputy Frederick's motion for summary judgment. Plaintiff filed replies to Defendants' motions for summary judgment on May 3, 2010 and May 7, 2010. A hearing was held on the cross motions for summary judgment on June 23,

2010. This matter is now ripe for consideration.

II. DISCUSSION OF THE LAW

A. Summary Judgment Standard

Summary judgment is appropriate only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Rule 56(c) mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v.*
Catrett, 477 U.S. 317, 322 (1986).

In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in the nonmovant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

Moreover, "[w]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

B. Cross Motions for Summary Judgment

Plaintiff argues that his speech is "chilled and he is deterred from demonstrating with the graphic abortion signs in Greenwood County because he fears criminal prosecution for his message." (Am. Compl. ¶ 44.) Accordingly, Plaintiff brings this action under 42 U.S.C. § 1983 seeking damages, injunctive and declaratory relief for the violation of his rights of free speech, peaceable assembly, and the free exercise of religion. (*Id.*, generally.)

Plaintiff argues that he is entitled to summary judgment because Defendants' restrictions on his speech were based on the content of his message. (Pl. Mem. Supp. Summ. J. 7.) Defendants argue that they are entitled to summary judgment because Plaintiff cannot show a violation of his federally protected rights. (Defs. Mem. Supp. Summ. J., generally); (Chief Deputy Frederick Mem. Supp. Summ. J., generally.) Specifically, Defendants argue that their restrictions on CCL's speech constituted a reasonable time, place, and manner restriction and they "*could* lawfully sanction or threaten sanctions for violation of any lawfully imposed restrictions." (Defs. Mem. Supp. Summ. J. 13.) Defendants also argue that they are entitled to qualified immunity. (Defs. Mem. Supp. Summ. J., generally); (Chief Deputy Frederick Mem. Supp. Summ. J., generally.)

1. Freedom of Speech and Assembly

The First Amendment of the United States Constitution protects an individual's right to freedom of expression through speech and public assembly.

Virginia v. Black, 538 U.S. 343, 358 (2003); Nat'l *Socialist White People's Party v. Ringers*, 476 F.2d 1010, 1016 (4th Cir. 1973). "The protections afforded by the First Amendment, however, are not absolute, and . . . the government may regulate certain categories of expression consistent with the Constitution." *Id.* "The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995). In traditional public forums, such as streets, public sidewalks, and parks, "a State's right to limit protected expressive activity is sharply circumscribed: It may impose reasonable, content-neutral time, place, and manner restrictions . . . , but it may regulate expressive content only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest." *Id.*

It is undisputed that CCL's November 3, 2005 demonstration took place within a traditional public forum. As such, Defendants could not impose a content-based restriction on CCL's speech unless the "restriction [wa]s necessary to serve a compelling state interest and . . . [wa]s narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Plaintiff asserts that Defendants' "demand that CCL put down only the graphic Signs was a content-based restriction" improperly based on "the reaction of the public." (Pl. Mem. Supp. Summ. J. 9, 11.) Specifically, Plaintiff contends that

> [in his dialogue at the intersection,] Major Smith did not say that CCL was too close to the road, obstructing traffic, impeding lines of sight for drivers. Such at least facially content-neutral statements would have presumably prompted a different type of request from the Sheriff–ranging from a request to move back from the road several feet or to a specified intersection to the use of smaller signs. Further, the request would have been as to all CCL's signs and not simply the Signs the Sheriff and the two citizens disfavored. Instead the demand from the Sheriff simply reinforces its improper regard for the content of the Signs–notably, its only demand was that the Signs be put down or a citation would [be] issue[d]. The problem for the Sheriff was not the size or location of any signs; it was the existence of *the* Signs, the ones depicting aborted babies, a patently content-based demand.

(*Id.* at 17 (footnote omitted).) Defendants argue, however, that they

> did not base their action on disagreement with [Plaintiff's] viewpoint or otherwise on the content of the speech, but rather on the harmful effects of the *method* [Plaintiff] used . . . . [D]efendants' actions, which were limited to ordering [Plaintiff] to remove the graphic signs and threatening to ticket him if he did not, were directed at the breach of the peace–not at the protestors' viewpoint. . . . [D]efendants' actions, therefore, were not based on the content of [Plaintiff's] message,

> on disagreement with his beliefs or opinions, but rather, on the fact that extremely graphic representations were disturbing motorists and causing traffic issues.

(Defs. Mem. Supp. Summ. J. 15.)

Upon review of the totality of the evidence within the record, the court finds that Defendants' restriction on Plaintiff's speech was content-based. While Defendants contend that their restriction is content-neutral because it was not motivated by disapproval or disagreement with Plaintiff's pro-life stance, this argument confuses *viewpoint* neutrality with *content* neutrality. The United States Supreme Court has consistently "rejected the argument that viewpointneutrality equals contentneutrality." *Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc.*, 511 U.S. 1135, 1135 (1994) (O'Connor, J., dissenting) (citing cases); see e.g., *Boos v. Barry*, 485 U.S. 312, 319-20 (1988) (explaining that while a restriction is viewpoint neutral that "does not render [it] content neutral"). "[C]ontent-neutral speech restrictions . . . are *justified* without reference to the content of the regulated speech." *Boos*, 485 U.S. at 320 (internal quotation marks omitted). The restriction imposed upon Plaintiff's speech was motivated solely based upon the content of the graphic signs.[1] As such, Defendants' restriction

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[1] CCL members also carried large textual signs, some of which were larger than the graphic posters, that were not banned by Defendants. See (Defs. Mem. Supp. Summ. J. Attach. 12 (Officer Strickland Aff., pictures attached).). As such, it does not appear that neutral aspects, such as the size

was content-based. *See World Wide Street Preachers' Fellowship v. City of Owensboro*, 342 F. Supp. 2d 634, 641 (W.D. Ky. 2004) (finding government restriction on graphic anti-abortion sign content-based); *United States v. Marcavage*, No. 09-3573, 2010 WL 2384839, at *14 (3d Cir. June 16, 2010) (finding government restriction on graphic anti-abortion sign content-based).

Content-based restrictions on speech "are presumptively invalid and subject to strict scrutiny." *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009) (internal quotation marks omitted). Therefore, Defendants' restriction on Plaintiff's speech must (1) serve a compelling state interest *and* (2) be narrowly drawn to achieve that end. *Perry Educ. Ass'n*, 460 U.S. at 45. In *World Wide Street Preachers' Fellowship*, 342 F. Supp. 2d at 637, the court reviewed whether a content-based ban on a graphic anti-abortion sign survived strict scrutiny. In World Wide, the city prohibited an evangelical group from displaying a large sign containing an enlarged photograph of a mutilated fetus. *Id.* at 636. The city argued, in part, that protecting young children was a compelling government interest justifying the ban. *Id.* at 640-41. The court concluded that assuming protecting children from these images was a compelling state interest, the defendants' blanket ban on the sign was not narrowly tailored. *Id.* at 641. The court explained, while the government "is not required to employ the least restrictive means conceivable . . . [i]t must, however, demonstrate narrow tailoring of the challenged regulation to the

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of the posters, was the motivating force behind the ban on the graphic posters.

asserted interest–a fit that is not necessarily perfect, but reasonable." *Id.* (internal quotation marks and citation omitted). Ultimately, the court concluded that

> the City of Owensboro [could not] show that its actions were narrowly drawn to achieve that compelling state interest. The City made no attempt to establish any type of "fit" between its interest of protecting children and the street preachers' interest in exercising free speech. While depriving the Plaintiffs of the sign enabled the City of Owensboro to attain its compelling state interest, the means employed did not account in any way for a less restrictive alternative that would enable the street preachers to exercise their right to free speech. Completely banning the signs is not narrow tailoring.
>
> Also problematic, as the Plaintiffs point out, is the City's reliance that the images are too "graphic." Who decides when an image is too "graphic?" Is it the police or the heckler? In either case, the term is too vague to be constitutional. As such, the City of Owensboro's actions are unconstitutional.

Id.

Here, Defendants allege that their concerns for traffic safety and protecting young children served as compelling interests for preventing a breach of the peace and requiring Plaintiff and CCL members to take down all graphic signs. Specifically, Defendants contend that

> the following factors [created a breach of the peace]: (1) the signs were gruesome, gory, graphic, in full color, and large; (2) the intersection at which the signs were being displayed was the busiest intersection in Greenwood County, and the signs were being displayed at a time and in such a manner as to interfere with traffic; (3) the protestors were positioning the signs along the sidewalk in such a way that motorists would not be able to both avoid looking at them and drive safely; and (4) parents with children in the car would not be able to shield the children from the images. In other words, the protesters, were forcing unwilling recipients to view the offensive images on their signs, and more importantly, were depriving parents of the ability to shield their children from images that could be harmful to them.

(Defs. Mem. Supp. Summ. J. 16-17.) Despite Defendants' argument that traffic safety was a compelling interest, in his conversation with Plaintiff, Major Smith did not mention traffic safety as his reason for wanting the graphic signs down. The record evidences that two citizens made complaints; however, neither complaint stated that the signs were interfering with traffic.[2] *See* (Defs.

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[2] According to the incident report, Keith Fisher informed Lt. Miles "that when he was traveling through the intersection he saw several people standing on the corners holding and carrying large posters of graphic photographs of aborted fetuses." (Defs. Mem. Supp. Summ. J. Attach. 2 (Incident Report).) Another complainant, Patience Payne, complained that her five-year-old-son saw one of the

Mem. Supp. Summ. J. Attach. 2 (Incident Report).). The only mention of disturbance of traffic is found in the incident report written by Lt. Miles. The incident report states that when Lt. Miles arrived on the scene, he

> talked to STEVE LEFEMINE. He told me he was leading the protest for the organization [CCL]. I told Mr. Lefemine that the Sheriff's Dept. has had several complaints about the graphic photographs and this was causing a disturbance in the traffic flow at the intersection. I told Mr. Lefemine that he would have to quit using the blow horn while showing the photographs because it was disturbing people and upsetting traffic flow.

(*Id.* Attach. 2 (Incident Report).) The record is devoid, however, of any evidence of car accidents, unusual or dangerous congestion, or any similar traffic concerns. As such, the court finds that traffic safety, under the facts of this case, was not a compelling interest to justify Defendants' restriction.

Defendants also argue that protecting young children from viewing graphic pictures was a compelling state interest that justifies their ban on the graphic pictures. One parent complained that her child saw one of the graphic signs and became frightened. (Defs. Mem. Supp. Summ. J. Attach. 2 (Incident Report).) In his conversation with Plaintiff, Major Smith explained that the signs were offensive because "small children" may see the signs. (*Id.*

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graphic signs and became "frightened and upset." (*Id.* Attach. 2 (Incident Report).)

Attach. 3 (Transcript). The court agrees that protecting children may be a compelling interest. However, strict scrutiny requires a two-step analysis. Once a compelling government interest is shown, the court must then determine whether the government's restriction was *narrowly* tailored to meet that compelling interest. *Perry*, 460 U.S. at 45.

Similar to the defendants in *World Wide Street Preachers' Fellowship*, Defendants restricted Plaintiff's speech by banning all graphic signs. 342 F. Supp. 2d at 636. Plaintiff, therefore, was faced with the choice of either taking down all of the graphic signs or receiving a citation for breach of the peace. Such a blanket ban, under the facts of this case, does not constitute narrow tailoring. Defendants made no attempt to satisfy its interest, protecting children from seeing the signs from the main road, without completely banning Plaintiff's right to communicate a message utilizing the signs. Rather, Defendants' sole motivation was to completely ban all of the graphic signs which they clearly found to be "offensive." (Defs. Mem. Supp. Summ. J. Attach. 3 (Transcript).) The United States Supreme Court has "consistently stressed that we are often captives outside the sanctuary of the home and subject to objectionable speech." *Cohen v. California*, 403 U.S. 15, 21 (1971) (internal quotation marks omitted). Accordingly, the court finds that Defendants did not narrowly tailor its restriction to achieve its interest in protecting children. As such, Defendants' restriction of Plaintiff's speech on November 3, 2005, was unconstitutional. *See e.g., Frye v. Kansas City Missouri Police Dep't*, 375 F.3d 785, 792 (8th Cir. 2004) (finding government restriction on graphic abortion sign constitutional because officers narrowly

tailored the restriction by allowing graphic signs to be displayed at a location further from the road.)

Based on the foregoing, the court grants Plaintiff's motion for summary judgment as to the freedom of speech and assembly claims.

2. Free Exercise of Religion

Plaintiff also seeks summary judgment on his free exercise of religion claim. Plaintiff asserts that "[i]n the exercise of [his] religious beliefs, CCL either displays or supervises the display of pro-life signs in Greenwood County." (Am. Compl. ¶ 57.) Therefore, "[a]s a direct and proximate result of the Sheriff's actions and policies, Mr. Lefemine's speech is chilled, and he is deterred from freely exercising constitutionally protected religion." (*Id.* ¶ 59.) Plaintiff alleges that Defendants' "threat of arrest or ticketing clearly forced [him] to 'modify his behavior' and thereby 'violate his beliefs.'" (Pl. Mem. Supp. Summ. J. 18.)

"The Free Exercise Clause of the First Amendment, applicable to the states through the Fourteenth Amendment, forbids the adoption of laws designed to suppress religious beliefs or practices unless justified by a compelling governmental interest and narrowly tailored to meet that interest." *Booth v. Maryland*, 327 F.3d 377, 380 (4th Cir. 2003). Likewise, the government, through its actions, may not suppress religious beliefs absent a compelling governmental interest and narrow tailoring.

"The Free Exercise Clause, however, does not relieve an individual of the obligation to comply with

a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* (internal quotation marks omitted). However, as discussed above, Defendants' prohibition of the graphic signs was not neutral and therefore must survive strict scrutiny. For the reasons discussed above, the court finds that Defendants' prohibition upon Plaintiff was not narrowly tailored to meet its interest. Defendants' prohibition was not narrowly tailored in order to balance meeting the government's interest in protecting children with Plaintiff's right to freely express his religious beliefs.[3] Therefore, the court grants Plaintiff's motion for summary judgment as to his free exercise of religion claim.

3. Qualified Immunity

a. Individual Capacity

Defendants allege that they are entitled to qualified immunity because there was no clearly established law indicating that their conduct would violate Plaintiff's constitutional rights. (Defs. Mem. Supp. Summ. J. 23.); (Chief Deputy Frederick Mem.

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[3] The court acknowledges that the free exercise of religion "embraces two concepts,–freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. State of Connecticut*, 310 U.S. 296, 303-04 (1940). However, for the reasons explained in the free speech analysis above, the court concludes that Defendants' blanket ban on Plaintiff's use of graphic pictures was not narrowly tailored.

Supp. Summ. J., generally.) "[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (internal quotation marks omitted).

> What this means in practice is that whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.

Id. (internal quotation marks omitted).

> [C]learly established for purposes of qualified immunity means that [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 614-15 (internal quotation marks omitted).

In *Saucier v. Katz*, 533 U.S. 194, 201 (2001), the United States Supreme Court established a "two-step sequence for resolving government officials' qualified immunity claims." *Pearson v. Callahan*, 129

S. Ct. 808, 815 (U.S. 2009). "First, a court [has to] decide whether the facts that a plaintiff . . . allege[s] . . . [set] out a violation of a constitutional right. Second, if the plaintiff . . . satisfie[s] this first step, the court . . . decide[s] whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* at 815-16 (internal citations omitted). In *Pearson*, however, the United States Supreme Court held that "while the [Saucier test] is often appropriate, it should no longer be regarded as mandatory." *Id.* at 818. "The judges of the district courts . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* Thus, *Pearson* "does not prevent the lower courts from following the Saucier procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases." *Id.* at 821.

The court finds that the *Saucier* procedure is worthwhile in the instant case particularly because the first prong has been satisfied. As discussed above, Defendants violated Plaintiff's constitutional right to free speech in a traditional public forum. The question now becomes whether a reasonable officer could have believed that prohibiting demonstrators from displaying large signs containing pictures of dismembered, aborted fetuses at a major intersection was lawful, in light of clearly established First Amendment law and the information they possessed.

In November 2005, there was no clearly established law provided by the United States Court

of Appeals for the Fourth Circuit regarding the extent to which government officials may proscribe the use of photographs of aborted fetuses in a traditional public forum. "[R]eliance on decisions from other circuits to determine that a given proposition of law is clearly established is inappropriate as a general matter." *Wilson v. Layne*, 141 F.3d 111, 117 (4th Cir. 1998). While it was clearly established that individuals have a right to freely express their views in a traditional public forum such as sidewalks, that is not enough. "[T]he right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant, sense." *Saucier*, 533 U.S. at 202 (internal quotation marks omitted). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

The court finds that, under the specific facts of this case, it was not unreasonable for Defendants to believe that their prohibition was lawful. After arriving at the intersection, Major Smith called his superior, Chief Deputy Frederick, now former Chief Deputy Frederick, to describe what was taking place. After speaking with Major Smith, Chief Deputy Frederick advised Major Smith that "the disturbance could be addressed as a breach of the peace based on the combination of the graphic nature of the signs and their proximity to the road, and that, in keeping with the law, he could order the protestors to stop waving the graphic signs; he further directed [Major] Smith to have the signs removed from areas visible from the roadway." (Defs. Mem. Supp. Summ. J. 3.);

(Id. Attach. 6 (Chief Deputy Frederick Dep. 40-44).) Chief Deputy Frederick explained that based on "various constitutional law classes [he's] had, FBI Academy and in-service type training" he believed that he had a duty to "protect the public from what we see as, for example, roadway hazards, distracted motorists, et cetera. And that in this particular instance, [he] made the judgment that the danger to the motorist outweighed their right to stand six inches from the roadway and conduct themselves as they were." (Chief Deputy Frederick Mem. Supp. Summ. J. Add'l Attach. 4 (Chief Deputy Frederick Dep. 26-27).)

At the instruction of Chief Deputy Frederick, Major Smith spoke with Plaintiff about removing the graphic signs while Officer Strickland took pictures at the scene. As counsel for Plaintiff and Defendants stated during the hearing on the cross motions for summary judgment, Major Smith and Officer Strickland behaved professionally and courteously at all times during their interaction with Plaintiff and members of CCL. When faced with fulfilling its obligation to protect citizens on the roadways without infringing upon the free speech rights of Plaintiff, Defendants' decision to prohibit the graphic signs, while ultimately failing to survive scrutiny, was not unreasonable under the circumstances. "The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (internal citation and quotation marks omitted). Accordingly,

Defendants are immune from suit in their individual capacity.[4]

b. Official Capacity

Plaintiff also brings suit against Defendants in their official capacity. "Official-capacity suits . . . generally represent . . . another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (internal quotation marks omitted). As such, Plaintiff's claims against Defendants in their official capacity are merely claims against the Greenwood County Sheriff's Office ("Sheriff's Office"). Sheriff Wideman "was the Greenwood County Sheriff at all times pertinent to the specific events alleged within this First Amendment Complaint. In his official capacity, he was responsible for enforcement of Greenwood County's laws, ordinances, and policies." (Am. Compl. ¶ 12.) "To hold [the Sheriff's Office] liable for a single decision (or violation), the decisionmaker must possess final authority to establish municipal policy with respect to the action ordered." *Love-Lane v. Martin*, 355 F.3d 766, 782 (4th Cir. 2004) (internal quotation marks omitted).

The Sheriff's Office cannot be held liable pursuant to respondeat superior for the constitutional violations of their employees. *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658, 692-94 (1978). Instead, "it is when execution of a government's policy or custom, . . . inflicts the injury that the government as an entity is responsible." *Id.*

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[4] Defendant Sheriff Davis is sued only in 4 his official capacity.

at 694. Plaintiff has not sufficiently pled facts to support the conclusion that it is the policy or custom of the Sheriff's Office to violate a citizen's First Amendment rights. Further, Plaintiff has not shown a policy or custom of the Sheriff's Office to utilize breach of the peace violations as a way to infringe upon a citizen's First Amendment rights. As such, Defendants are immune from suit in their official capacity. Therefore, Plaintiff is not entitled to monetary damages.

4. Attorney's Fees

Pursuant to 42 U.S.C. § 1988(b), a prevailing party in a § 1983 action may, in the court's discretion, receive attorney's fees. Under the totality of the facts in this case the award of attorney's fees is not warranted.

Therefore, it is

ORDERED that Defendants' motions for summary judgment, docket numbers 41 and 46, are granted in part and denied in part; it is further

ORDERED that Plaintiff's motion for summary judgment, docket number 42, is granted in part and denied in part; it is further

ORDERED that Plaintiff's request for attorney's fees is denied; and it is further

ORDERED that Defendants are enjoined from engaging in content-based restrictions on Plaintiff's display of graphic signs without narrowly tailoring its restriction to serve a compelling state interest.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States
District Judge

Greenville, South Carolina
July 8, 2010

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 12-168

IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN LEFEMINE
D/B/A COLUMBIA CHRISTIANS FOR LIFE,

Petitioner,

v.

DAN WIDEMAN, MIKE FREDERICK, LONNIE SMITH,
BRANDON STRICKLAND AND TONY DAVIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATED COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities ii

Statement of the Case 1

Reasons for Denying The Petition 3

I. Clear precedent from the United State Supreme Court provides that a civil rights plaintiff for whom relief was denied on an immunity defense is not entitled to recover attorney's fees under 42 U.S.C. § 1988. 3

II. The Fourth Circuit applied the correct standard in concluding that the Petitioner does not qualify as a "prevailing party." 4

III. The Fourth Circuit's decision does not create an intra-circuit split or a circuit split on the "prevailing party" test or the applicable standard of review. 8

Conclusion 11

TABLE OF AUTHORITIES

Cases

Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598 (2001). 4, 6

Farrar v. Hobby, 506 U.S. 103 (1992). 4, 5

Goldstein v. Moatz, 445 F.3d 747 (4th Cir. 2006). 9

Grissom v. The Mills Corp., 549 F.3d 313 (4th Cir. 2008). 9

Hensley v. Eckerhart, 461 U.S. 424 (1983)..... 5

Hewitt v. Helms, 482 U.S. 755 (1987). 5

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989). 4

Kentucky v. Graham, 473 U.S. 159 (1985). 3

Pegram v. Herdrich, 530 U.S. 211 (2000). 9

People Helpers Foundation, Inc. v. City of Richmond, 12 F.3d 1321 (4th Cir. 1993). 4

Rhodes v. Stewart, 488 U.S. 1 (1988). 5

Smyth ex rel. Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002). 9

Sole v. Wyner, 551 U.S. 74 (2007). 7, 8

Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719 (1980). 3

Texas State Teachers Association v. Garland Industrial School District, 489 U.S. 782 (1989). 5, 6, 7, 8

United States v. Guglielmi, 819 F.2d 451 (4th Cir. 1987). 10

Statutes

42 U.S.C. § 1983. 1

42 U.S.C. § 1988. ..... 1, 3

STATEMENT OF THE CASE

The Petitioner Steven C. Lefemine brought this action pursuant to 42 U.S.C. § 1983 alleging that various employees of the Greenwood County Sheriff's Office violated his First Amendment rights during an anti-abortion protest occurring on a busy public roadway in Greenwood County, South Carolina on November 3, 2005. The Petitioner was asked by sheriff's deputies to remove large, graphic signs depicting aborted fetuses.

Following the completion of discovery, the parties filed cross-motions for summary judgment. By order filed July 8, 2010, United States District Judge Henry M. Herlong, Jr. granted in part and denied in part those cross-motions. In denying the Petitioner's claim for nominal damages, the district court ruled that the individual officers were each entitled to qualified immunity. Judge Herlong determined that "[i]n November 2005, there was no clearly established law provided by the United States Court of Appeals for the Fourth Circuit regarding the extent to which government officials may proscribe the use of photographs of aborted fetuses in a traditional public forum." (App. 46-47). The district court ruled that "under the specific facts of this case, it was not unreasonable for Defendants to believe that their prohibition was lawful." (App. 47).

The district court did, however, grant limited injunctive relief to the Petitioner. Specifically, he enjoined the Respondents "from engaging in content-based restrictions on Plaintiff's display of graphic signs without narrowly tailoring its restriction to serve a compelling state interest." (App. 50). In effect, the district court ordered the Respondents to comply with the law in the future. Finally, the district court denied the Petitioner's prayer for attorney's fees under 42 U.S.C. § 1988.

party." Second, the Fourth Circuit's reliance on *People Helpers Foundation* was not in error. Third, the Fourth Circuit did not adopt a new "prevailing party" test inconsistent with this Court's precedent.

This Court has addressed the meaning of the term "prevailing party" in a series of cases. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), this Court held that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." 461 U.S. at 433. Later, in *Hewitt v. Helms*, 482 U.S. 755 (1987), the Court required the plaintiff to prove "the settling of some dispute which affects the behavior of the defendant towards the plaintiff" in order to recover attorney's fees. 482 U.S. at 761. Then, in *Rhodes v. Stewart*, 488 U.S. 1 (1988), the Court explained that "[a] declaratory judgment ... is no different from any other judgment. It will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff." 488 U.S. at 4.

Next, in *Texas State Teachers Association v. Garland Industrial School District*, 489 U.S. 782 (1989), the Court "synthesized the teachings of *Hewitt* and *Rhodes*." *See*, *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). The Court held that "to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." 489 U.S. at 792. "The touchstone of the prevailing party inquiry must be the *material* alteration of the legal relationship of the parties." 489 U.S. at 792-93. (Emphasis added). The Court explained that "a technical victory may be so insignificant ... as to be insufficient to support prevailing party status." 489 U.S. at 792.

Later, in *Farrar, supra*, this Court reaffirmed the necessity for the plaintiff to demonstrate a material alteration

REASONS FOR DENYING THE PETITION

1. **Clear precedent from the United State Supreme Court provides that a civil rights plaintiff for whom relief was denied on an immunity defense is not entitled to recover attorney's fees under 42 U.S.C. § 1988.**

As his first reason for granting a writ of certiorari, the Petitioner argues that the Fourth Circuit's decision will deny "untold numbers of civil rights plaintiffs of attorney's fees that Congress intended them to have." In analyzing the Petitioner's argument, which is not an argument made in the circuit court below, it appears that the Petitioner is arguing that plaintiffs whose § 1983 claims are denied on the basis of qualified immunity should still be deemed a "prevailing party" entitled to an award of attorney's fees under 42 U.S.C. § 1988.

The Petitioner insists that the Fourth Circuit has promulgated a "new rule" denying attorney's fees to plaintiffs who lose their civil rights claim on a qualified immunity defense. However, the Petitioner not surprisingly fails to cite a single decision from a district court, circuit court or this Court that actually awarded attorney's fees under § 1988 to a plaintiff that lost on a qualified immunity defense.

More importantly, the Petitioner has disregarded key precedent from this Court on this very question. In particular, in *Kentucky v. Graham*, 473 U.S. 159 (1985), this Court held that "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either *because of legal immunity* or on the merits, § 1988 does not authorize a fee award against that defendant." 473 U.S. at 165. (Emphasis added). Similarly, in *Supreme Court of Virginia v. Consumers Union of United*

The Court does not suggest – let alone hold – that in every instance where there is a judgment or court-ordered consent decree then there automatically *must be* a "material alteration" per *Texas State Teachers Association*. In other words, the Court does not limit any inquiry as to the existence of a "material alteration." Instead, it is quite evident that the Court held in *Buckhannon* only that the "material alteration" – if any – must result from a judgment on the merits or a court-ordered consent decree and may not arise from a voluntary, non-court-sanctioned change in conduct by the defendant. For that was the issue that this Court was specifically addressing in *Buckhannon* and *not* any modification of the "prevailing party" test set forth in *Texas State Teachers Association*.

In sum, contrary to the Petitioner's suggestion, *Buckhannon* does not prevent a court from evaluating whether a court order effects a "*material* alteration" of the legal relationship of the parties. In fact, in *Sole v. Wyner*, 551 U.S. 74 (2007), decided post-*Buckhannon*, this Court continued to cite to *Texas State Teachers Association* and its "material alteration" requirement as the "touchstone of the prevailing party inquiry." 551 U.S. at 82. Thus, it was appropriate for the Fourth Circuit in the case at bar to evaluate whether the district court order effected a "material alteration" of the legal relationship of the parties. Likewise, it was appropriate for the Fourth Circuit to cite to the *People Helpers Foundation* case which in turn applied the test articulated in *Texas State Teachers Association*, *supra*. Contrary to the Petitioner's argument, the Fourth Circuit did not adopt a new prevailing party test inconsistent with this Court's precedent. Instead, the Fourth Circuit applied the appropriate standard and concluded that the district court had simply "ordered Defendants to comply with the law and safeguard Plaintiff's constitutional rights in the future" which in the court's judgment was not a material alteration of the legal relationship of the parties. (App. 22-23). Thus, the issuance of a writ of certiorari is not warranted on this issue.

The Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. A three-judge panel of that court affirmed on all issues, including the ruling that the Respondents are entitled to qualified immunity.

In addition to the ruling on the merits, the Petitioner also appealed the denial of attorney's fees under § 1988. The Fourth Circuit determined that the district court did not abuse its discretion in denying an award of attorney's fees. The circuit court noted that the injunction was limited to an order that the Respondents comply with the law in the future -- law which the court had concluded was not clearly established in 2005. The Fourth Circuit ultimately concluded that the Petitioner did not qualify as a "prevailing party" because "the outcome of this litigation has not altered the relative positions of the parties." (App. 23).

The Petitioner thereafter filed a petition for rehearing and rehearing *en banc*. That petition was denied. No judge requested a poll on the petition for rehearing *en banc*. (App. 8).

The Fourth Circuit has previously held that "[t]he determination of a party as a prevailing party ... is a legal determination which we review de novo." *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 274 (4th Cir. 2002). *See also*, *Grissom v. The Mills Corp.*, 549 F.3d 313 (4th Cir. 2008); *Goldstein v. Moatz*, 445 F.3d 747 (4th Cir. 2006). In the present case, the Fourth Circuit did not overturn or reverse that authority. In effect, the circuit court did not change the standard of review.

Instead, it is evident that the Fourth Circuit applied the standard of review urged by the Petitioner. In his brief in the circuit court, the Petitioner articulated his first issue on appeal as follows: "Under controlling Supreme Court precedent, did the court below abuse its discretion when it failed to award Mr. Lefemine attorney's fees after it awarded him permanent injunctive relief against the Sheriff?" In that same brief, the Petitioner explained the applicable standard of review as follows: "this Court reviews a district court's failure to award attorney's fees for abuse of discretion." The Petitioner never argued that a *de novo* standard applied to any attorney's fees issue. The Petitioner's position was then re-stated by the Fourth Circuit in its decision, where the court explained the issue on appeal as follows: "Plaintiff argues that the district court *abused its discretion* by failing to award it attorney's fees." (App. 21). (Emphasis added). It is disingenuous for the Petitioner to now claim reversible error where the court below applied the standard of review actually urged by the Petitioner. The Petitioner should be judicially estopped from asserting a contrary position on appeal. *See*, *Pegram v. Herdrich*, 530 U.S. 211, 227, n.8 (2000) (judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase").

States, Inc., 446 U.S. 719 (1980), this Court vacated an award of attorney's fees under § 1988 after ruling that the defendants were entitled to absolute legislative immunity. The Court found nothing "in the legislative history of the [Civil Rights Attorney's Fees Awards Act of 1976] to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity." 446 U.S. at 738. *See, Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 762 (1989) ("Our cases have emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes"). *See also, Farrar v. Hobby*, 506 U.S. 103, 109 (1992).

Therefore, because the Respondents were found not liable to Petitioner on the basis of qualified immunity, that provided no basis for an award of attorney's fees under § 1988. The Petitioner's suggestion that the Fourth Circuit adopted a "new rule" to that effect is clearly incorrect and does not warrant the issuance of a writ of certiorari.

II. The Fourth Circuit applied the correct standard in concluding that the Petitioner does not qualify as a "prevailing party."

The Petitioner contends that the Fourth Circuit applied an incorrect standard for determining a "prevailing party" and specifically erred in relying on its earlier decision in *People Helpers Foundation, Inc. v. City of Richmond*, 12 F.3d 1321 (4th Cir. 1993). The Petitioner contends that the Fourth Circuit failed to apply the standard enunciated in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001).

The Petitioner's position is incorrect for several reasons. First, the Fourth Circuit applied the correct standard in concluding that the Petitioner does not qualify as a "prevailing

of the legal relationship of the parties. The *Farrar* Court explained that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. at 111-12.

The Petitioner suggests that *Buckhannon*, *supra*, made an additional revision or modification to the "prevailing party" standard – which is a misreading of that case. In *Buckhannon*, this Court addressed whether the so-called "catalyst theory" supports "prevailing party" status. In rejecting the "catalyst theory," the Court held that a "prevailing party" does not include "a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." 532 U.S. at 600. The Court did not explicitly or implicitly make any substantive change to the "prevailing party" standard with its decision in *Buckhannon*, other than to reject the "catalyst theory" and require the prevailing party to have obtained a judgment on the merits or a court-ordered consent decree. Certainly, the Court did not alter, revise or modify its prior holdings including the "material alteration" requirement as set forth in *Texas State Teachers Association v. Garland Industrial School District*, *supra*.

Nonetheless, the Petitioner contends that this Court in *Buckhannon* did alter the "prevailing party" test and ruled that the "material alteration" requirement is satisfied in all instances by mere proof that the plaintiff obtained a judgment on the merits or a court-ordered consent decree. The Petitioner points to the following language from *Buckhannon*: "These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." 532 U.S. at 604. However, the Petitioner misreads the import of this language.

III. The Fourth Circuit's decision does not create an intra-circuit split or a circuit split on the "prevailing party" test or the applicable standard of review.

As a corollary to its previous argument, the Petitioner insists that Fourth Circuit's decision on the "prevailing party" test creates a circuit split and an intra-circuit split, both of which arguments lack merit.

As for an intra-circuit split, the Petitioner cites to five Fourth Circuit decisions in which he claims that Fourth Circuit applied a different "prevailing party" test than in the present case. That is incorrect. In not one of those cases did the Fourth Circuit abandon the "material alteration" test articulated in *Texas State Teachers Association*, *supra*, or conclude that that test is satisfied by showing only that the plaintiff obtained a judgment on the merits or a court-ordered consent decree in his favor. The necessity of a "material alteration" is described in each of those cases, and three of the cases specifically cite to *Texas State Teachers Association*, *supra*, by name.

The same is true for the alleged circuit split. The Petitioner has not shown that the Fourth Circuit applied some "new" test. Instead, the Fourth Circuit has applied the "material alteration" test from *Texas State Teachers Association*, *supra*, which continues to be the applicable test even post-*Buckhannon*. That test allows the court to determine whether the court order or consent decree effects a "material alteration" of the legal relationship of the parties. As mentioned above, this Court as well has found that the "material alteration" test is alive and well post-*Buckhannon*. *See*, *Sole v. Wyner*, 551 U.S. 74 (2007).

In addition to the "prevailing party" test, the Petitioner also claims an intra-circuit and circuit split with regard to the applicable standard of review. The Petitioner's position on this issue also lacks merit.

In fact, it is likely that the Fourth Circuit applied an abuse of discretion standard only because it was urged by the Petitioner. Certainly, the Fourth Circuit decision cannot be read as reversing prior authority in the circuit or authority from other circuits where the circuit court does not specifically state its intent to change or modify existing precedent. Moreover, it is well settled that a three-judge panel has no authority to overturn the precedent of the circuit. *See*, *United States v. Guglielmi*, 819 F.2d 451, 457 (4th Cir. 1987) (only an *en banc* court, not a subsequent panel, has authority to overturn a previous panel's published decision).

Finally, the Petitioner cannot show anything more than harmless error. The Fourth Circuit's decision in this case reflects that the panel would have found that the Petitioner failed to satisfy the "material alteration" test even under a *de novo* standard. Significantly, the circuit court has already stated that the district court's decision was not based on "mistaken legal principles." (App. 23). That is another way of saying that the law was correctly applied – and that satisfies a *de novo* standard of review.

In short, the Fourth Circuit's decision in this case may not be read as adopting a new standard of review for a "prevailing party" inquiry. Existing Fourth Circuit precedent applying a *de novo* standard remains unchanged by this decision. No circuit split has been created. Consequently, there is no basis for the issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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September 5, 2012

REPLY BRIEF

RECORD
AND
BRIEFS

No. 12-168

In the Supreme Court of the United States

STEVEN LEFEMINE, d/b/a Columbia Christians for Life,

Petitioner,

v.

DAN WIDEMAN, individually and in his official capacity; MIKE FREDERICK, individually and in his official capacity; LONNIE SMITH, individually and in his official capacity; BRANDON STRICKLAND, individually and in his official capacity; and TONY DAVIS, Sheriff, in his official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES vi

ARGUMENT 1

INTRODUCTION 1

I. THE OFFICERS FAIL TO REBUT MR. LEFEMINE'S FIRST REASON FOR GRANTING THE WRIT, NAMELY THAT UNTOLD NUMBERS OF CIVIL RIGHTS PLAINTIFFS WILL BE STRIPPED OF ATTORNEY'S FEES CONGRESS INTENDED THEM TO HAVE. 2

II. THE OFFICERS FAIL TO REBUT MR. LEFEMINE'S SECOND REASON FOR GRANTING THE WRIT, NAMELY THAT THE FOURTH CIRCUIT MISUNDERSTOOD AND MISAPPLIED THIS COURT'S "PREVAILING PARTY" JURISPRUDENCE. 6

III. THE OFFICERS FAIL TO REBUT MR. LEFEMINE'S THIRD REASON FOR GRANTING THE WRIT, NAMELY THAT THE FOURTH CIRCUIT CREATED TWO CIRCUIT SPLITS AND TWO INTRA-CIRCUIT CONFLICTS. 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases **Page(s)**

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001) 10-12

Culebras Enterprises Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987) 4

Farrar v. Hobby, 506 U.S. 103 (1992) 7

Hewitt v. Helms, 482 U.S. 755 (1987) 6

Jensen v. Clarke, 94 F.3d 1191, (8th Cir. 1996) 4

Kentucky v. Graham, 473 U.S. 159 (1985) 8-10

LaFleur v. Wallace State Community College, 955 F. Supp. 1406 (M.D. Ala. 1996) 4

Pulliam v. Allen, 466 U.S. 522 (1984) 4, 10

Paxman v. Campbell, 612 F.2d 848 (4th 1980) (*en banc*) 4

Rhodes v. Stewart, 488 U.S. 1 (1988) 7, 11

Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) 3

Solomon v. Emanuelson, 586 F. Supp. 280 (D. Conn. 1984) 4

Summers v. Adams, 669 F. Supp. 2d 637

(D.S.C. 2009) 5

Summers v. Adams, No. 3:08-2265 (D.S.C. May 26, 2010) (order granting attorney's fees) 5

Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980) 8, 10

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989) 7

Wolfel v. Morris, 972 F.2d 712 (6th Cir. 1992) 4

Statutes

42 U.S.C. § 1983 6,10

42 U.S.C. § 1988 ..... *passim*

Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* 2

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* 2

Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* 2

"Title IX," 20 U.S.C. § 1681 *et seq.* 2

Other Materials

Sp. Ct. R. 10 2

ARGUMENT

INTRODUCTION

The issue before this Court is whether the Fourth Circuit erred when it refused to consider the Plaintiff, Mr. Lefemine, a prevailing party under the civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988), despite affirming the district court's issuance of injunctive and declaratory relief. In his Petition for a Writ of Certiorari, Mr. Lefemine explained three reasons why this Court should grant his Writ. The answers given by Respondents, employees of the Greenwood County, South Carolina, Sheriff's Office (herein after "Officers"), to these reasons are unavailing. One attempted answer amounts to a non-answer and a red herring. The other two answers variously mis-state case law, fail to understand Mr. Lefemine's arguments, and concede his points. Thus, the Officers' reasons for not granting the Writ evaporate, while Mr. Lefemine's reasons for granting the Writ remain compelling.

I THE OFFICERS FAIL TO REBUT MR. LEFEMINE'S FIRST REASON FOR GRANTING THE WRIT, NAMELY THAT UNTOLD NUMBERS OF CIVIL RIGHTS PLAINTIFFS WILL BE STRIPPED OF ATTORNEY'S FEES CONGRESS INTENDED THEM TO HAVE.

The Officers cite this first reason from Mr. Lefemine's Petition and chide him for not making this "argument" in the court below. (Br. in Opp. 3.) The Officers initially correctly characterize Mr. Lefemine's assertion as a "reason for granting a writ

of certiorari." (*Id.*) Unfortunately, they later (as noted) mis-characterize this assertion as "an argument [not] made ... below ...." (*Id.*) Perhaps the Officers are seeking to insinuate that this "argument" is waived. However, Mr. Lefemine's assertion is not an "argument" in that sense at all. Rather, it is a "reason" of the sort referred to in this Court's Rule 10, which states (emphasis added) that "[a] petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the *reasons* the Court considers ...." The rule then describes that character, using the word "important" five times.

The Officers make no argument as to why the loss of congressionally-intended attorney's fees to untold numbers of civil rights plaintiffs does present the important question of when plaintiffs prevail under federal fee-shifting statutes. Here, Mr. Lefemine's free exercise, free speech, and free assembly rights were all denied by the Officers. (App. 43-44.) But law enforcement officers can and do violate the rights of all sorts of protesters: pro-life, as here, or pro-choice; pro-union or pro-management; or indeed religious, political, or social protestors for or against any issue.

And § 1988 authorizes fee awards in cases brought under eleven different federal statues, including various Reconstruction-era civil rights laws, the Civil Rights Act of 1964, Title IX, the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act. Furthermore, as Mr. Lefemine pointed out in his

Petition, this Court has frequently stated that "prevailing party" is a term of art that is interpreted similarly across the various fee-shifting statutes. (Pet. 18 n.7.) Thus, the issue of which plaintiffs have prevailed will impact plaintiffs bringing suit under a myriad of federal statutes. In 1983, this Court noted that more than 150 federal statutes awarded fees to "prevailing," "substantially prevailing," and "successful parties." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983). The Officers have not explained why putting at risk fee awards in all these contexts is not an important federal question.

However, the Officers' do attempt to cover this non-answer with a red herring. The Officers wrote that Mr. Lefemine has "not surprisingly fail[ed] to cite a single decision from a district court, circuit court or this Court that actually awarded attorney's fees under § 1988 to a plaintiff that lost on qualified immunity defense." (Br. in Opp. 4.)

Presumably, the gist of this statement is that since Mr. Lefemine did not cite any such cases, they are non-existent or at least not common, thus belying the assertion that numerous fee awards are endangered by the Fourth Circuit's opinion. But this statement is misleading on multiple fronts.

First, it actually is not surprising that Mr. Lefemine did not cite such cases, but not in the sense the Officers mean. Given the points that Mr. Lefemine made in his Petition (that the Fourth Circuit's opinion ignored this Court's precedent and that it creates two circuit splits and two intra-circuit conflicts), there is a much wider circle of cases from which to draw than merely those in which a court

"actually awarded attorney's fees under § 1988 to a plaintiff that lost on qualified immunity defense." (*Id.*) Cases involving any (or at least most) of the 150 fee statutes mentioned above, cases involving any of numerous immunity defenses other than qualified immunity, cases in which plaintiffs were held *not* to be prevailing parties, cases in which courts note that fees might or will be awarded upon application (and often are by separate order), and cases in which damages are not sought were *all* relevant to Mr. Lefemine's points.

Two additional items demonstrate the misleading nature of this red herring. First, Mr. Lefemine did cite, (Pet. 9), one of this Court's opinions that puts the issue beyond dispute: "The legislative history of § 1988 clearly indicates that Congress intended to provide for attorney's fees in cases where relief properly is granted against officials who are immune from damages awards." *Pulliam v. Allen*, 466 U.S. 522, 527 (1984).

Second, 1988/qualified immunity/actual award cases do exist. *See, e.g., Jensen v. Clarke*, 94 F.3d 1191, 1196-97, 1203 (8th Cir. 1996); *Wolfel v. Morris*, 972 F.2d 712, 714, 720-21 (6th Cir. 1992); *Culebras Enterprises Corp. v. Rivera Rios*, 813 F.2d 506, 509, 512 (1st Cir. 1987); *LaFleur v. Wallace State Community College*, 955 F. Supp. 1406, 1427-28 (M.D. Ala. 1996); and *Solomon v. Emanuelson*, 586 F. Supp. 280, 282-83 (D. Conn. 1984).

Two cases deserve special mention. The first is *Paxman v. Campbell*, 612 F.2d 848, 852, 855-66 (4th 1980) (*en banc*), in which the Fourth Circuit *correctly* held that a plaintiff who "lost" on qualified

immunity, but who obtained injunctive relief was a prevailing party entitled to attorney's fees. The court remanded for the fee determination. *Id.*[1]

The second is *Summers v. Adams*, 669 F. Supp. 2d 637, 672-73 (D.S.C. 2009). This case is significant for several reasons. It was litigated in the District of South Carolina, the same court in which the instant case originated. Counsel of Record for one of the *Summers* defendants is the same attorney serving as Counsel of Record for the Officers here. An order granting $202,705.57 in expenses and attorney's fees under § 1988 was issued on May 26, 2010, *Summers v. Adams*, No. 3:08-2265 (D.S.C. May 26, 2010), less than two weeks before the opinion was issued in the instant case. (App. 51.) Although the attorney did object to the amount of expenses and the amount of fees sought for litigating the fee motion itself, he did not object to the fees requested for the litigation on the merits, and he did not argue that the plaintiffs had not prevailed, *Summers* at 2, despite the fact that the plaintiffs lost on qualified immunity and obtained "only" injunctive relief, 669 F. Supp. 2d at 672-73.

Thus, 1988/qualified immunity/actual award cases do exist, and the Fourth Circuit's opinion threatens congressionally-intended fees in those and countless other cases.

Because the Officers' non-answer and red herring cannot disguise the very real threat to proper

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[1] This case was not cited in the Petition because it addresses neither the prevailing party test nor the standard of review.

fee awards, this Court should grant the Writ to prevent the pernicious effects of the Fourth Circuit's opinion from spreading.

II. THE OFFICERS FAIL TO REBUT MR. LEFEMINE'S SECOND REASON FOR GRANTING THE WRIT, NAMELY THAT THE FOURTH CIRCUIT MISUNDERSTOOD AND MISAPPLIED THIS COURT'S "PREVAILING PARTY" JURISPRUDENCE.

The Officers claim that Mr. Lefemine has argued that "plaintiffs whose § 1983 claims are denied on the basis of qualified immunity should still be deemed a 'prevailing party' ...." (Br. in Opp. 3). Quite to the contrary, Mr. Lefemine has argued that plaintiffs who *win* relief on their § 1983 claims, should be considered prevailing parties. In the instant case, qualified immunity barred only an award of damages; Mr. Lefemine *won* declaratory and injunctive relief. (App. 20, 25.).

Thus, Mr. Lefemine clearly prevailed under this Court's prevailing party jurisprudence, which Mr. Lefemine briefed in his Petition (pages 11-16) *and* which the Officers explained in their Brief in Opposition (pages 5-7). Much that the Officers explain is actually correct *and supports Mr. Lefemine's view.*

First, quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987), the Officers write that this "Court require[s] the plaintiff to prove 'the settling of some dispute which affects the behavior of the defendant towards the plaintiff.'" (Br. in Opp. 5.)

Mr. Lefemine agrees.

Next, quoting *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988), the Officers write that this "Court explained that '[a] declaratory judgment ... is no different from any other judgment. It will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff.'" (Br. in Opp. 5.)

Mr. Lefemine agrees.

Third, quoting *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989); and *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992), the Officers assert that the "touchstone" of the prevailing party analysis is whether the relationship between the parties has been *materially* altered. (Br. in Opp. 5.)

Mr. Lefemine agrees.

Later, (Br. in Opp. 7), the Officers apply this jurisprudence to the instant case. They argue that the Fourth Circuit's analysis—that Mr. Lefemine's declaratory and injunctive relief did not create "a material alteration of the legal relationship of the parties"—was correct.

Here, Mr. Lefemine *disagrees*.

As the Fourth Circuit acknowledged, Mr. Lefemine, through counsel, attempted to obtain a commitment from the Sheriff's Office that he could engage in pro-life protests in the County without the risk of arrest that he had previously faced.

Respondent, Chief Deputy Frederick, answered in writing, "'should we observe any protester or demonstrator committing the same act, we will again conduct ourselves in exactly the same manner: order the person(s) to stop or face criminal sanctions.'" (App. 9, *quoting* Frederick's letter.)

After obtaining declaratory and injunctive relief, Mr. Lefemine may now conduct his protests freely. This is a material alteration in his legal relationship with the Officers.

Yet under the Officer's and the Fourth Circuit's reasoning, neither Mr. Lefemine nor any other plaintiff who obtains injunctive relief, declaratory relief, or both, can be awarded attorney's fees if, due to the defendant's immunity, that plaintiff failed to obtain damages. This Court should grant the Writ in order to quickly stop the Fourth Circuit's error from spreading.

The Officers also attempt to turn the tables on Mr. Lefemine, claiming *he* "disregards key precedent from this Court ...." (Br. in Opp. 3.) Yet, the Officers' invocation of *Kentucky v. Graham*, 473 U.S. 159 (1985), and *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), and two other cases in support of this assertion (Br. in Opp. at 3-4), is virtually impossible to understand: in *Graham*, immediately following the quotation used by the Officers, that Court quoted the same passage from *Consumers Union* that the Officers did. The combined quotations plus appropriate context read as follows:

> in [*Consumers Union*] ... a three-judge District

> Court had found the Virginia Supreme Court and its chief justice in his official capacity liable for promulgating, and refusing to amend, a State Bar Code that violated the First Amendment. The District Court also awarded fees against these defendants pursuant to § 1988. We held that absolute legislative immunity shielded these defendants for acts taken in their legislative capacity. We then vacated the fee award, stating that we found nothing "in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity. Thus, liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant.

Graham, 473 U.S. at 164-65 (citation and footnotes omitted).

What makes the Officers' use of this passage impossible to understand is the very next sentence and a footnote that occurs in the middle of the passage. Footnote 8, appended to the next to last sentence of the above quotation reads:

> We did hold that the court and its chief justice in his official capacity could be enjoined from *enforcing* the State Bar Code and suggested that fees could be recovered from these defendants in their enforcement roles. Because

> the fee award had clearly been made against the defendants in their legislative roles, however, the award had to be vacated and the case remanded for further proceedings. That fees could be awarded against the Virginia Supreme Court and its chief justice pursuant to an injunction against enforcement of the Code further illustrates that fee liability is tied to liability on the merits.

Id. at 165 n.8.

Thus, this Court has clearly stated that a defendant against whom an injunction has issued has been found "liabl[e] on the merits" and that "fees [can] be awarded against" such a defendant. *Id.*

Yet, the Officers cited these cases for the *exact* opposite proposition.

To compound their error, the Officers also overlooked the very next (citation) sentence in the *Consumers Union* quotation. Occurring immediately after a sentence that the Officers themselves quoted (*i.e.*, not one that Mr. Lefemine added for context), that sentences reads: "Cf. *Pulliam v. Allen,* 466 U.S. 522, 543-544, (1984) (state judge liable for injunctive and declaratory relief under § 1983 also liable for fees under § 1988)." *Graham*, 473 U.S. at 165.

Finally, in support of their assertion, the Officers' argue that Mr. Lefemine has suggested that this Court modified the prevailing party test in *Buckhannon Board and Care Home, Inc. v.*

West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001). (Br. in Opp. 6.) This is the exact opposite of the argument Mr. Lefemine made. He argued that *Buckhannon* merely "connected the dots" from prior cases. (Pet. 15) His point was that the Fourth Circuit illegitimately felt free to *ignore Buckhannon's* instructions by adding an additional step to its test, a step that awards fees to only a *subset* of the plaintiffs this Court stated in *Buckhannon* and prior cases were eligible for awards. *Id.*

One other point is important: The Officers claim that Mr. Lefemine believes that *every* time a plaintiff obtains a judgment or consent decree, the legal relationship between the parties is automatically materially altered. (Br. in Opp. 7). This is not true. There can be circumstances in which declaratory relief, at least, will not render the plaintiff a prevailing party. Mr. Lefemine acknowledged this with a direct quotation of *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988). (Pet. 14.)

Because Mr. Lefemine has correctly argued that the Fourth Circuit's opinion misunderstands and misapplies this Court's jurisprudence and because the Officers have demonstrated how defendants can commit the same mistake when invoking the Fourth Circuit's opinion, this Court should grant the Writ to prevent other Circuits from following suit.

III. THE OFFICERS FAIL TO REBUT MR. LEFEMINE'S THIRD REASON FOR GRANTING THE WRIT, NAMELY THAT THE FOURTH CIRCUIT CREATED TWO CIRCUIT SPLITS AND TWO INTRA-CIRCUIT CONFLICTS.

Because the Officers misunderstood Mr. Lefemine's argument about *Buckhannon*, they also misunderstood his argument about the Circuit split and intra-circuit conflict over the prevailing party test. Mr. Lefemine *agrees* with the Officers that "[i]n not one of those cases [cited in the Petition] did the Fourth Circuit abandon the 'material alteration test' .... The same is true for the alleged circuit split." (Br. in Opp. 8.) It was only in the *instant case* that the Fourth Circuit added an additional, invalid step to this Court's test. And it is that additional step that creates a circuit split. Further, as Mr. Lefemine argued (Pet 7-17), because that circuit split so seriously threatens congressionally-intended fee awards, this Court should not wait to see whether the Fourth Circuit's error spreads. It should instead grant the Writ to correct this error at its earliest opportunity.

As for the circuit split and intra-circuit conflict over the standard of review, the Officers' argument again partially re-makes Mr. Lefemine's argument and partially misses the mark. The Officers concede that the correct standard review is *de novo*. (Br. in Opp. 9.) However, the Officers fail to address Mr.

Lefemine's argument that the panel in this case conflated two questions: "the question of abuse of discretion in failing to award fees [and] the question of whether Mr. Lefemine is, in fact, a prevailing plaintiff, and declared that this conflated question is subject to abuse of discretion review." (Pet. 21.)

Furthermore, Mr. Lefemine acknowledged that this question was *by itself* not as important as the remainder of the Fourth Circuit's errors, but noted that it went hand-in-hand with the other errors. Certainly, this error can only heighten, and not diminish, the importance of granting the Writ.

The Officers also argue that Mr. Lefemine should be estopped from making this argument. (Br. in Opp. 9.) Mr. Lefemine can only assume that the Officers failed to note those portions of his Argument just cited and the pertinent portions of his Statement of the Case, each of which independently explain the reason for the difference between Mr. Lefemine's argument to the panel and his argument to the *en banc* court—reasons that make estoppel inapplicable. (Pet. 5-6, 20-21.)

In sum, because the Officers variously concede Mr. Lefemine's arguments or misunderstand them, they have not rebutted Mr. Lefemine's circuit split (or intra-circuit conflict) arguments. And, to repeat, this circuit split is not one that should be allowed to percolate.

CONCLUSION

For the foregoing reasons, this Court should grant the Writ.

Respectfully submitted,
this 18th day of September, 2012

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